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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ROBERTO TORO, JR., U.S. AIR FORCE, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

AND OTHER CASES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the Judge Advocate General of an Armed Force, who is not authorized to make appointments under the Appointments Clause of the Constitution, appoint commissioned officers to serve as trial and military appellate judges, on the theory that their appointment as commissioned officers already satisfies the Appointments Clause for both their judicial and non-judicial duties?

2. Does the Due Process Clause of the Fifth Amendment require that, in peacetime, military trial and appellate judges be appointed to their judicial duties for fixed terms?

LISTING OF PARTIES PURSUANT TO RULE 24.1(b)

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Petitioners

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI[1]

The petitioners, Roberto Toro, Jr., et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992), *cert. granted*, 61 U.S.L.W. 3783 (May 24, 1993), is reprinted as Appendix A at App. 1a. The unpublished decision of the

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* Full listing of parties to this proceeding appears on page ii.

[1] This petition incorporates essentially the same brief which was submitted by U.S. Navy counsel in *Weiss v. United States*, No. 92-1482, and by U.S. Army counsel in *Barkley v. United States*, No. 92-1646, and *Doucette v. United States*, No. 93-68.

United States Navy-Marine Corps Court of Military Review, *United States v. Weiss*, No. 89-4189 (N.M.C.M.R. Jan. 31, 1992), is reprinted as Appendix B at App. 86a.

The decision of the United States Court of Military Appeals in *United States v. Toro*, 37 M.J. 313 (C.M.A. 1993), is reprinted as Appendix D at App. 88a. The decision of the United States Air Force Court of Military Review, in *United States v. Toro*, 34 M.J. 506 (A.F.C.M.R. 1991), is reprinted as Appendix E at App. 89a. The opinion of the United States Court of Military Appeals, *United States v. Rice*, 36 M.J. 264 (C.M.A. 1993), is reprinted as Appendix C at App. 91a.

JURISDICTION

The decisions of the Court of Military Appeals were rendered between June 25, 1993 and August 18, 1993. The jurisdiction of the Court is invoked under 10 U.S.C.A. § 867a (Supp. 1993) and 28 U.S.C.A. § 1259 (3) (Supp. 1993).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2 provides:

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The relevant provisions of the Uniform Code of Military Justice, Articles 6, 16, 26 and 66, 10 U.S.C. §§ 806, 816, 826, and 866, are set forth in Appendix L, Pet. App. at 199a. Rule for Courts-Martial 1002, Manual for Courts-Martial, 1984, is set forth in Appendix M, Pet. App. at 205a.

STATEMENT OF THE CASE

This is a consolidated petition representing interested service members of varying ranks from the Air Force, whose court-martial convictions were affirmed by the Court of Military Appeals between June 25, 1993 and August 18, 1993. In *United States v. Toro*, 37 M.J. 313 (C.M.A. 1993) and *United States v. Lipscomb*, No. 68201/AF (C.M.A. August 20, 1993), the judicial appointment issue was expressly raised at the Court of Military Appeals. In the latter case, the due process issue was also raised. In both of these cases, the Court of Military Appeals granted review to consider the judicial appointment issue, and rendered adverse summary dispositions in light of *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992) (Appendix A). The remaining petitioners raise the judicial appointment issue pursuant to the jurisdictional statement herein, *infra* p. 2, and *United States v. Rice*, 36 M.J. 264 (C.M.A. 1993) (Appendix C). Each case is factually distinct, and most raised other issues before the Court of Military Appeals which are not the subject of this petition.[2]

Subsequent to the Court of Military Appeals' decision in *Weiss*, that Court acknowledged in *United States v. Rice*, 36 M.J. 264 (C.M.A. 1993) (Appendix C) that there were over

[2] Where, in the appendices the individual orders of the Court of Military Appeals refer to a particular issue number, that issue represents the judicial appointment question.

200 cases pending wherein the trial and appellate military judges were challenged because they were not appointed in accordance with the United States Constitution, Art. II, § 2, cl. 2. In *Rice*, the Court of Military Appeals recognized the possibility of a grant of certiorari and relief by this Court, and, if so, afforded petitioners the opportunity for further relief. This petition adopts and incorporates the same argument as set forth in *Weiss*, *infra* (No. 92-1482).

Like *United States v. Weiss*, this petition raises two closely related questions which go to the heart of judicial independence for military trial judges who preside over courts-martial and for military appellate judges who review convictions. All military trial judges and almost all appellate military judges are commissioned officers and lawyers on active duty in their services. Unlike judges appointed under Article I or Article III, military judges are not appointed by the President with the advice and consent of the Senate. Nor are they appointed by the President alone, the head of a department, or a court of law composed of Article I or III judges. Instead, military judges are selected and appointed by the Judge Advocate General of their service, who is the senior uniformed lawyer in each armed service in charge of all military legal personnel, and who is responsible for the overall supervision of military justice matters. *See* Uniform Code of Military Justice art. 6(a), 10 U.S.C. § 806(a) (1988). Moreover, the Judge Advocates General who appoint military judges have absolute and unreviewable discretion to remove or transfer them out of their judicial assignments, and those judges lack protection if their decisions do not suit their Judge Advocate General. Accordingly, the method of appointment to judicial service in the Armed Forces violates the Appointments Clause, and the lack of any fixed term for those judicial offices violates the Due Process Clause of the Fifth Amendment.

1. *Institutional Framework.*

Under Article I of the Constitution, Congress has established a three-tier system of military courts. At the top is the Court of Military Appeals, which has five civilian judges appointed by the President with the advice and consent of the Senate for fixed terms. Uniform Code of Military Justice art. 142, 10 U.S.C.A. § 942 (West. Supp. 1992). The appointments and tenure of those judges are not at issue.

Below the Court of Military Appeals are four Courts of Military Review, one each for the Army, Air Force, Coast Guard, and Navy-Marine Corps. Presently, there are approximately 35 appellate military judges, who may be either military officers or civilians, all of whom are appointed by the Judge Advocate General of their service. In addition, for each service's Court of Military Review, where petitioners' cases were heard, the respective Judge Advocates General, or, the Assistant Judge Advocates General sign and submit the judges' annual fitness reports, which are used to decide promotions, duty assignments, and susceptibility to involuntary early retirement. Although these courts are permanent courts, located in the Washington, D.C. area, none of the judges is appointed to a fixed term of office. Uniform Code of Military Justice art. 66(a), 10 U.S.C. § 866(a) (1988). The Courts of Military Review are typically divided into three-member panels, each with their detailed rules to manage and regulate dockets and the attorneys who practice before them. Absent waiver by an accused, the Courts of Military Review are required to review all cases in which a death sentence, confinement of one year or more, a dismissal, or a bad-conduct or dishonorable discharge is adjudged. Uniform Code of Military Justice art. 66(b), 10 U.S.C. § 866(b) (1988).

Military trial judges preside at special courts-martial and, if qualified, at general courts-martial.[3] Trial judges must be

3 Currently, there are approximately 95 judges from all of the services who are certified to preside at general courts-martial.

military officers, all of whom have been appointed as military officers by the President with the advice and consent of the Senate. However, their selection and appointment as a judge is made by the Judge Advocate General of their service. Like appellate judges, the trial judges have no fixed terms of office. Uniform Code of Military Justice art. 26(a)-(c), 10 U.S.C. § 826(a)-(c) (1988). Military trial judges are assigned to a circuit and are supervised by a Circuit Chief Judge, who in turn reports to and is supervised by the Chief Judge of the Trial Judiciary of the respective service.

Each armed force assigns military judges as and when it sees fit. Judges often serve a two-, three- or four-year assignment. However, a judicial assignment can be terminated at any time through decertification as a judge or by transfer to other duties at the discretion of the Judge Advocate General of the judge's armed force.[4]

A court-martial can try any offense committed by a member of the armed services regardless of when or where the offense took place, who the victim was, what was done, or why it was done—the sole requirement is that the accused was on active duty in the military at the time of the offense. *Solorio v. United States*, 483 U.S. 435 (1987). A general court-martial may impose sentences that include death, imprisonment for life or terms of years, total forfeiture of pay and allowances, and/or a dishonorable or bad-conduct discharge (or dismissal for officers). 10 U.S.C. § 818 (1988). A bad-conduct or dishonorable discharge carries a permanent stigma, and it can have an

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[4] William H. Cook, *Courts-Martial: The Third System in American Criminal Law*, 1978 So. Ill. U. L. Rev. 1, 17-18; 1 Francis A. Gilligan & Frederic I. Lederer, *Court-Martial Procedure* 14-31.00, at 518-19 (1991). The Judge Advocate General does not issue the actual orders for a transfer, but there is no doubt that, for all military lawyers, including military trial and appellate judges, he controls their actual duty assignments.

adverse impact on civilian job opportunities, as well as on certain government-provided benefits. *See United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989); *United States v. Maharajh*, 28 M.J. 797 (A.F.C.M.R. 1989). Special courts-martial may impose up to six months of confinement, and/or forfeiture of up to two-thirds pay per month for six months, and/or a bad conduct discharge. Uniform Code of Military Justice art. 19, 10 U.S.C. § 819 (1988).

Military trial judges are, for all practical purposes, the equivalent of United States District Judges and Magistrate Judges who preside over criminal trial in federal district courts. The drafters of the Uniform Code of Military Justice wanted military judges to be "real judges" as commonly understood in the American legal tradition. *United States v. Graf*, 35 M.J. 450, 465 (1992). The military trial judge has far-ranging discretionary powers, including the power to "rule on all interlocutory questions and all questions of law raised during the court-martial," to "[i]nstruct the members [the jury] on questions of law and procedure which may arise," to "promulgate and enforce rules of court," and to "exercise contempt power." Uniform Code of Military Justice art. 48, 10 U.S.C. § 848 (1988). If the accused elects a bench trial, a general court-martial judge has even more discretion than does a district judge because the court-martial trial judge is not bound by the Federal Sentencing Guidelines. *See United States v. Brown*, 28 M.J. 470, 474 n.3 (C.M.A. 1989); *see generally* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1002.

Courts of Military Review exercise all of the traditional powers of appellate courts including those under the All Writs Act. *See Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979). Additionally, these courts exercise an "awesome, plenary, *de novo* power of review[.]" *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). Thus, a court "[m]ay affirm

only such findings of guilty and the sentence . . . as it finds correct in law and fact. . . . [I]t may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact[ ]" Uniform Code of Military Justice art. 66(c), 10 U.S.C. § 866(c) (1988).

2. ***Rulings of the Court of Military Appeals.***

The Court of Military Appeals exercised its discretionary jurisdiction to consider petitioners' claims that the manner in which the trial and appellate military judges in their cases were appointed violated the Appointments Clause of the Constitution, and that failure to appoint those judges to fixed terms of office denied petitioners liberty without due process. *See* Pet. App. 2a n.1. Several days before it heard argument in *Weiss*, the Court of Military Appeals issued an opinion rejecting the due process claim. *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992).[5] Then, on December 24, 1992, a sharply divided court rejected petitioner Weiss' Appointments Clause argument and affirmed the Navy-Marine Corps Court's decision.

In order to garner three votes, the majority below needed two separate and largely inconsistent rationales. Judge Gierke, writing the lead opinion for himself and Judge Cox, agreed that Congress may establish a military justice system, but that Congress cannot declare an exemption for military judges from the Appointments Clause. Therefore, Judge Gierke held that military judges are officers who must be appointed in accordance with the Appointments Clause, either by the President with the advice and consent of the Senate, by the President alone, by a Head of Department, or by a Court of Law.

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5 A petition for writ of *certiorari* in *Graf* was filed on December 29, 1992 (No. 92-1102), and it is incorporated by reference. In the interest of completeness, this petition will summarize the *Graf* decision, as well as the reasons for granting review of the Due Process issue.

Pet. App. 5a. This proposition was endorsed by four of the court's five judges. Pet. App. 21a, 36a. 77a.

Judge Gierke then held that the Appointments Clause is satisfied when a military officer is commissioned by the President with the advice and consent of the Senate, because military judges are simply military officers with legal training. Relying on *Shoemaker v. United States*, 147 U.S. 282 (1893), Judge Gierke first ruled that Congress had not created a "new office" when "Law Officers" became "Military Judges" in the Military Justice Act of 1968 and thus no new appointment was necessary. Alternatively, he concluded that, if a new office had been created, the duties of the military judge were "germane" to those duties already required of a military officer with legal training: "The principle we glean from *Shoemaker* is that Congress may create a new office and give a military officer the duties of that office without making a new appointment necessary, if the duties are germane[.]" Pet. App. 8a.

Judge Crawford eschewed the opinion of Judge Gierke, and concurred only in the result. In her view the appointment of military judges need not comply with the Appointments Clause at all because of the special deference given to Congress when it regulates the land and naval forces. Her opinion does not mention *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam), in which this Court held that no class or type of officer is excluded from the reach of the Appointments Clause because of the special nature of their office or the plenary power of Congress over the subject area. Additionally, Judge Crawford reached her conclusion even though the Department of Justice (appearing as an *amicus* below, urging affirmance) disavowed that position in both its brief (Brief at 10) and at oral argument.

Chief Judge Sullivan and Judge Wiss each filed dissenting opinions rejecting the arguments in both of the majority opinions. The dissenters found no broad exemption to the stric-

tures of the Appointments Clause based on the judges' status as military officers or military lawyers. Pet. App. 37a, 74a. Chief Judge Sullivan stressed the watershed events of the Military Justice Act of 1968 which for the first time created a "*professional judiciary*" in the military. Pet. App. 58a. (italics in original). He recognized that what had occurred was no mere transfer of duties, but was a clear break from past practice by creating the new offices of military trial and appellate judge. Judge Wiss disagreed with the lead opinion's application of *Shoemaker* to this case, in particular its assertion that the assignment of specific and highly responsible judicial duties as a military judge is "germane to some nebulous notion of duties of legally trained military officers in general," *i.e.*, to the duties of the entire Judge Advocate General's Corps from which military judges are chosen. Pet. App. 83a.

The court did not revisit *Graf* where it had overruled Graf's due process objection to the lack of fixed terms of office for military judges for two reasons. First, *Graf* rejected the balancing test set forth in *Matthews v. Eldridge*, 424 U.S. 319 (1976), which had long been used to resolve Fifth Amendment due process claims. Instead, the court used the less exacting Fourteenth Amendment due process standard enunciated in *Medina v. California*, 112 S. Ct. 2572 (1992), which involved review of a state criminal conviction. Second, *Graf* treated dicta from *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), and *Palmore v. United States*, 411 U.S. 389 (1973), as approving the lack of fixed terms of office, and announced a new rule that military judges could not be removed in retaliation for their judicial decisions. Nowhere did the Court of Military Appeals suggest that military necessity precludes fixed terms for military judges generally, let alone for those who sit on the Courts of Military Review in the Washington, D.C. area or for courts-martial like these that are held in peacetime.

REASONS FOR GRANTING THE WRIT

This petition, like *United States v. Weiss*, seeks to establish minimum standards for the appointment of military judges and their retention in office for a fixed term. It does not seek to have the Uniform Code of Military Justice or the military justice system mirror that of Article III courts. Rather, it seeks to ensure that the separation of powers requirements embodied in the Appointments Clause, and the notions of fundamental fairness embodied in the Due Process Clause, are available to those tried by courts-martial. Taken alone, either the Appointments Clause or the Due Process violation would seriously undermine the fairness of the military justice system, but occurring together they call into question whether anyone in the armed forces can receive the minimal level of judicial independence that every justice system requires.

I. THE APPOINTMENTS CLAUSE VIOLATION

> Not since *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924 (1987), has an appeal presented questions of such fundamental importance to the institutional integrity and viability of the military justice system as does this one. Pet. App. 72a (Wiss, J., dissenting).

The Appointments Clause precludes Congress from placing the power to appoint inferior officers in anyone other than the President alone, the Courts of Law, or the Heads of Departments. U.S. Const. Art. II, § 2, Cl. 2. *Freytag v. Commissioner*, 111 S. Ct. 2631, 2642 (1991). There can be little doubt that military judges, who exercise extraordinary authority and discretion, are Officers of the United States and are subject to the Appointments Clause. *See Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam). No judge of the Court of Military Appeals disagreed with that proposition except Judge

and her position was specifically disavowed by the Department of Justice.

There is considerable force to the argument that military appellate judges are "superior" or "principal" officers, in which case the President must appoint them with the advice and consent of the Senate. But in any event, both military trial and appellate judges are at least inferior officers, and so they must be appointed either by the President, the Head of a Department, or by a Court of Law. No court has held that military judges are appointed to their judicial offices by any of the authorities listed in the Appointments Clause; the only question is whether their appointment as military judges, after they have been duly appointed as military officers, must be made by one of the authorities set forth in the Appointments Clause.

The Appointments Clause preserves "the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag*, 111 S. Ct. at 2638. As the Court reasoned in *Freytag*:

> The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint. Because it articulates a limiting principle, the Appointments Clause does not always serve the Executive's interests. *For example, the Clause forbids Congress from granting the appointment power to inappropriate members of the Executive Branch.* Neither Congress nor the Executive can agree to waive this structural protection. . . . The structural interests protected by the Appointments Clause are not those of any one Branch of government but of the entire Republic.

Freytag, 111 S. Ct. at 2639 (emphasis added).[6]

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6 A predictable consequence of having appointments made by an intermediate official, such as the Judge Advocate General, instead of by persons authorized by the Appointments Clause, is the homogeneity of

Relying on *Shoemaker*, two Court of Military Appeals judges found that the Appointments Clause had been satisfied because all military judges are commissioned officers of the Armed Forces, having been nominated by the President and confirmed by the Senate, although they have not been appointed to their judicial positions in that manner. Apparently recognizing that a presidential appointment had *some* limits—a Deputy Secretary of Defense could not simply move over to become the Assistant Attorney General for Antitrust or a Member of the Equal Employment Opportunity Commission—the opinion also concluded that there was no new office created when Congress amended the Uniform Code of Military Justice in 1968 to create the positions of military trial and appellate judges because the new positions were simply continuations of the old ones, with some modest changes. Even if that assessment were correct, and petitioners agree with the dissenters that it is not, that would at most allow those who were in a judicial position in 1968—the "incumbent[s]" in *Shoemaker's* words (147 U.S. at 301)—to continue in office without a new appointment. Stated another way, *Shoemaker* can at most solve the problem for those who were already serving in judicial positions in 1968, not for those who were yet to be appointed as judges, let alone those who were not yet military lawyers.

As a fall-back Judges Gierke and Cox argued that, under *Shoemaker*, Congress can add duties to an *existing* office without requiring that the person then in office be reappointed, so long as the "new" duties are "germane" to the "old" ones of that office. What they overlook is that *Shoemaker* arose in a one-time situation where Congress had added duties to

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the judges of the Courts of Military Review. Thus, the 35 current appellate judges include only two women and one African-American. The only two civilians sit on the five-member Coast Guard Court.

persons who were already in offices to which they had been properly appointed. But there would never be a problem for future occupants of those offices since they would be appointed to positions encompassing both the "new" and "old" duties. However, for military judgeships, the problem is repeated whenever a non-judge military lawyer replaces a military judge who retires or is transferred to a new assignment.

Even if *Shoemaker* allowed those who were serving as "law officers" in 1968 to continue in the new office of military judge, those who became military judges thereafter would fail to meet *Shoemaker*'s "germaneness" test. The duties and powers of military judges, including all of those involved in petitioners' cases, are so different from those of prosecutor, defense counsel, or legal advisor to a command—which is what most military lawyers do before they become military judges—that there is not simply an addition of a related duty, as in *Shoemaker*, but a substitution of a new job, with entirely new functions, for an old one. Surely, no one would contend that the two civilians on the Coast Guard Court of Military Review could be plucked from civilian life, even if they were administrative law judges working for the federal government, and placed on that Court without meeting the requirements of the Appointments Clause; the result should be no different from any other military judge, whether at the trial or appellate level. Similarly, no one would assume that a member of the staff of the General Counsel of the National Labor Relations Board could simply be "assigned" the additional duties of administrative law judge at that agency without satisfying the requirements of the Appointments Clause, yet that is the effect of the ruling below. Indeed, as both *Buckley* and *Freytag* make clear, it is the function that the individual is performing that is decisive in determining whether the Appointments Clause applies at all, and under that analysis there can be no question

that military judges must be separately appointed because their functions differ so markedly from those performed by other military lawyers. At the very least, these quite expansive extensions of *Shoemaker* raise serious questions that this Court should address.

The decision below rests on even shakier ground because the decisive vote was cast by Judge Crawford. She implicitly rejected an extension of *Shoemaker* in favor of a much more sweeping rationale: that the Appointments Clause does not apply at all to military judges, although her rationale would lead to the conclusion that the Clause does not apply to any appointments in the Armed Forces. Her ruling conflicts with, but does not even attempt to distinguish, *Buckley*, which made clear that there are no subject-matter exemptions from the Appointments Clause based on Congress's interest in, or plenary power over, particular subject areas. Judge Crawford's rationale also conflicts with decisions like *Rostker v. Goldberg*, 453 U.S. 57 (1981), and *Middendorf v. Henry*, 425 U.S. 25 (1976), which stand for the proposition that there are no wholesale exemptions from the Constitution simply because the case involves military affairs. Indeed, so extreme is Judge Crawford's ruling that the Department of Justice, which appeared below as an *amicus* in support of respondent, specifically rejected that position in its brief and at oral argument. It is highly unlikely that Judge Crawford would have taken the far more expansive route to affirming petitioner's convictions if she had been willing to accept the rationale put forward by Judge Gierke. Thus, if her "deference to Congress" analysis is in error—as it clearly seems to be—there were three votes to overturn petitioner's convictions, and it should be respondent, not petitioners seeking *certiorari*.

In this case it is not simply that the Judge Advocates General, who appoint military judges, are not listed in the Appointments Clause, but they are the supervisors of all

military lawyers who practice in military courtrooms, including all of those who prosecute criminal cases on behalf of the United States. In addition, the Judge Advocates General, or the Assistant Judge Advocates General, writes the annual fitness reports of the members of each respective service's Court of Military Review, which are then used to decide the appellate judges' promotions, future duty assignments, and susceptibility to involuntary early retirement. Indeed, the Due Process implications of this particular appointment arrangement raise independent concerns that strongly reinforce the Appointments Clause objections.

The validity of the appointment of military judges under the Appointments Clause is a significant constitutional question which the Court should address immediately. The 2-1-2 division within the Court of Military Appeals attests to the serious debate on the merits of the issues. A split in the circuits is unlikely ever to arise, because the question has been fully and fairly litigated and resolved by the military justice system, thus potentially insulating it from review on habeas corpus. *See generally, Watson v. McCoffer*, 782 F.2d 143, 145 (10th Cir.), *cert. denied*, 476 U.S. 1184 (1986). In any event, as it did in *Freytag*, this Court should grant review now to resolve the dispute as promptly as possible.

II. THE DUE PROCESS VIOLATION

The reasons this Court should grant review on the second question presented are set out in the previously-filed *Graf* petition and are only summarized below. But first, it is worth noting that, although the two questions presented arise under different constitutional provisions, the defects involve common concerns of accountability and fundamental fairness to an accused. Noncompliance with each of the provisions is magnified by the lack of compliance with the other, such that there is a synergistic impact on the accused's rights. To further

compound the problem, the Judge Advocate General can both appoint and remove military trial and appellate judges, yet he is also responsible for supervising the efficient working of the service's military justice system, including its prosecutors.

The lower court's application of *Medina*'s Fourteenth Amendment due process analysis to a *federal* Fifth Amendment due process claim is ample reason to hear the case. Indeed, in *Medina* this Court left open the correctness of one of its prior decisions—*United States v. Raddatz*, 447 U.S. 667, 677 (1980)—which had applied *Matthews v. Eldridge* to a due process challenge to a federal criminal conviction. Petitioners believe that respect for state legislative judgments and concerns of federalism, which loom so large in *Medina*, have no place where federal Due Process rights are at issue, but the uncertainty created by *Medina* underscores the need for this Court to settle an issue that only it can resolve. In that regard we also note that the concerns about overturning specific judgments made by state legislatures (*Medina*), or with those made by Congress for the Armed Forces, *Middendorf v. Henry*, 425 U.S. 25, 44 (1976), are inapplicable here because there is no evidence that in 1968, when Congress established the offices of military trial and appellate judge, it gave any thought to terms of office, let alone specifically legislated to preclude them.

Certainly, in time of war or other serious exigency, military necessity may require some adjustments regarding the tenure of trial judges, although not for the appellate judges who comprise the four Courts of Military Review, which sit permanently in the Washington, D.C. area. Moreover, neither the government nor the Court of Military Appeals has sought to justify the lack of any fixed term of office on grounds of military necessity. Instead, the Court of Military Appeals relied on other alleged protections against improper retaliation against military judges for unpopular decisions—some of which

it first announced in *Graf*—although none of them can be invoked by an accused, even if they were actually, as opposed to theoretically, available to the judges themselves. But even if those protections served to prevent naked retaliation, they cannot possibly guard against the more subtle and virtually undetectable problems of adverse or "faint praise" fitness reports that can have significant impacts on promotions, future assignments, and susceptibility for involuntary early retirement for all military judges.

At bottom, the Court of Military Appeals feel woefully short of justifying a massive exception to the generally-accepted principle of American jurisprudence, as reflected in such due process cases as *Tumey v. Ohio*, 274 U.S. 510 (1927), and in the nearly universal fact that state judges have fixed terms of office, such that judicial independence for those who preside at criminal trials and hear criminal appeals is an absolute minimum protection for the accused. The due process issue alone is sufficiently important to warrant plenary consideration by this Court, especially because the terms of office of a military judge can be cut short by a military officer who is the ultimate superior of both the judge and the prosecutor.

CONCLUSION

For the reasons stated, this Court should grant review in order to bring the military courts-martial system in line with accepted principles of American jurisprudence, and ensure that trials by court-martial are conducted in a fair and impartial manner.

Respectfully submitted,

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APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 67,869
NMCM 89 4189

UNITED STATES,
Appellee,

v.

ERIC A. WEISS,
Private U.S. Marine Corps,
Appellant.

Argued Oct. 6, 1992

Decided Dec. 21, 1992

For appellant: *Commander Philip D. Cave*, JAGC, USN (argued); *Captain Dwight H. Sullivan*, USMC and *Lieutenant Franklin J. Foil*, JAGC, USNR (on brief).

For appellee: *Lieutenant Commander Lawrence W. Muschamp*, JAGC, USN (argued); *Colonel T.G. Hess*, USMC (on brief).

Amici Curiae on behalf of appellant: *Colonel Malcolm H. Squires, Lieutenant Colonel James H. Weise, Major James M. Heaton* (on brief)—For Defense Appellate Division, USA. *Robert B. Weintraub, Joan E. Goldberg, Todd Gaziano* (on brief)—For the Committee on Mili-

tary Justice and Military Affairs, Association of the Bar of the City of New York.

Amici Curiae on behalf of appellee: *Thomas E. Booth* (argued); *Robert S. Mueller* (on brief)—For the United States Department of Justice. *Lieutenant Commander Charles J. Bennardini* (argued)—For Appellate Government Division, USCG. *Colonel Richard L. Purdon, Lieutenant Colonel Jeffery T. Infelise, Captain Jane M.E. Peterson* (on brief)—For Appellate Government Division, USAF. *Colonel Dayton M. Cramer, Major Joseph C. Swetnam, Captain Donna L. Barlett, Captain Samuel J. Smith, Jr.* (on brief)—For Government Appellate Division, USA.

Opinion

GIERKE, Judge:

A military judge sitting as a special court-martial convicted appellant, consistent with his pleas, of stealing a racquetball glove from the base exchange, in violation of Article 121, Uniform Code of Military Justice, 10 USC § 921. The approved sentence provides for a bad-conduct discharge, confinement and partial forfeitures for 3 months. The Court of Military Review affirmed the findings and sentence in an unpublished opinion dated January 31, 1992.

This Court granted review of the following issue: [1]

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[1] We also granted review of the following issue:

WHETHER THE COURT-MARTIAL WHICH TRIED THIS CASE HAD JURISDICTION WHERE THE MILITARY JUDGE WAS NOT APPOINTED TO A FIXED TERM OF OFFICE, AND WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW HAD POWER TO REVIEW AND AFFIRM THIS CASE WHERE ITS JUDGES WERE NOT APPOINTED TO A FIXED TERM OF OFFICE.

This issue was resolved adversely to appellant in *United States v. Graf*, 35 MJ 450 (CMA 1992).

WHETHER APPELLANT'S COURT-MARTIAL LACKED JURISDICTION WHERE THE MILITARY JUDGE WAS DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION, AND WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW WAS WITHOUT POWER TO REVIEW THIS CASE WHERE ITS JUDGES WERE DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION.

Appellant argues that military judges must be nominated by the President and confirmed by the Senate as military judges. The Government argues that military judges already have been nominated and confirmed as military officers, that military officers traditionally have performed judicial duties, and that military officers need not receive an additional appointment to perform judicial duties. We hold that the Constitution does not require that a military officer who meets the qualifications of Article 26, UCMJ, 10 USC § 826, receive a second appointment to perform the duties of a military judge. Likewise, we hold that a military officer meeting the qualifications of Article 66, UCMJ, 10 USC § 866, need not receive a second appointment to perform the duties of an appellate military judge.

I. Appointment of Officers of the United States

Article II, § 2, para. 2, clause 2 of the Constitution—the Appointments Clause—provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment

> of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The purpose of the Appointments Clause is twofold: (1) it protects the prerogative of the President from congressional encroachment on his power to appoint his subordinates; and (2) "it limits the universe of eligible recipients of the power to appoint." *Freytag v. Commissioner of Internal Revenue*, 501 U.S. ——, ——, 111 S.Ct. 2631, 2639, 115 L.Ed.2d 764 (1991). Appellant argues that this second purpose, a limitation on the power to appoint, is violated by Articles 26 and 66 because they vest the appointment power in the Judge Advocate General rather than the President, the Courts of Law, or the head of a department.

The first question we must address is whether the Appointments Clause is applicable to the military justice system. Government counsel have not disputed this applicability of the Appointments Clause. Counsel for the United States Coast Guard, appearing as amicus curiae, argue that the Appointments Clause does not apply to the military justice system because that system is created pursuant to the plenary power of Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. art. I, § 8, cl. 14, and that the Supreme Court grants great deference to Congress in the exercise of that power. *See United States v. Kovac*, 36 MJ 521, 522-23 (CGCMR 1992); *United States v. Prive*, 35 MJ 569, 573-77 (CGCMR 1992).

We agree that "[j]udicial deference . . . is at its apogee" when the authority of Congress to govern the land and naval forces is challenged. *Solorio v. United States*, 483 U.S. 435, 447, 107 S.Ct. 2924, 2931, 97 L.Ed.2d 364 (1987). Nevertheless, congressional authority to raise, support, and govern the armed forces is separate from the authority to appoint Officers of the United States. Judicial deference is granted only to the

former, a legislative power conferred by Article I of the Constitution. The appointment of Officers of the United States is an Executive power, conferred by Article II and controlled by the Appointments Clause, from which the armed forces are not exempt, either expressly or by implication.

In *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the Supreme Court held that the plenary power of Congress over federal election practices did not exempt members of the Federal Election Commission from the Appointments Clause. The Supreme Court explained:

> The position that because Congress has been given explicit and plenary authority to regulate a field of activity, it must therefore have the power to appoint those who are to administer the regulatory statute is both novel and contrary to the language of the Appointments Clause. Unless their selection is elsewhere provided for, *all* Officers of the United States are to be appointed in accordance with the Clause. . . . No class or type of officer is excluded because of its special functions.

Id. at 132, 96 S.Ct. at 688. Thus, we are compelled to conclude that, while Congress may determine how the military justice system will operate, it may not exempt those who will operate it from the Appointments Clause. Accordingly, we hold that the Appointments Clause is applicable to the military justice system.

The next question is whether the duties imposed on military judges by Articles 26 and 66 must be performed by an Officer of the United States, as that term is used in the Appointments Clause. Appellant contends, and we agree, that judicial duties may be performed only by "Officers of the United States," appointed in a manner consistent with the Appointments Clause. *See Freytag v. C.I.R.*, 501 U.S. ——, 111 S.Ct. 2631, 115 L.Ed.2d 764

(1991) (special trial judges of Tax Court); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374 (1931) (United States commissioners). *See also Buckley v. Valeo*, 424 U.S. at 126, 96 S.Ct. at 685 ("[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed" in accordance with the Appointments Clause.).

All military trial judges and most appellate military judges are commissioned officers of their respective armed forces. Commissioned officers of the armed forces are "Officers of the United States." *See Wood v. United States*, 107 U.S. 414, 417, 2 S.Ct. 551, 554, 27 L.Ed. 542 (1883). All regular officers of the military services are appointed by the President and confirmed by the Senate. *See* 10 USC § 531; *see also* 14 USC §§ 211 and 212 regarding appointment of regular Coast Guard officers. Reserve officers above the grade of major/lieutenant commander are appointed by the President and confirmed by the Senate. *See* 10 USC §§ 593 and 5912. Active duty military officers are appointed and confirmed again upon each promotion to a grade above pay grade 0-3. *See* 10 USC § 624 (promotion of active-duty regular and reserve officers of the Army, Air Force, Navy, and Marine Corps).

If judicial duties may be performed only by Officers of the United States, and military officers are Officers of the United States, the next question is whether military officers may perform judicial duties without a new "judicial" appointment. In *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170 (1893), the Supreme Court had occasion to consider the nature and scope of the office held by military officers. The Supreme Court held that two military officers, the Chief of Engineers and the Engineer Commissioner for the District of Columbia, did not require second appointments as members of a commission created by Congress to select land for Rock Creek Park in the District of Columbia, survey it, map

it, and determine the just compensation to be paid by the United States upon its condemnation. Justice Shiras explained:

> As, however, the two persons whose eligibility is questioned were at the time of the passage of the act and of their action under it officers of the United States who had been theretofore appointed by the President and confirmed by the Senate, we do not think that, because additional duties, germane to the offices already held by them, were devolved upon them by the act, it was necessary that they should be again appointed by the President and confirmed by the Senate.

He went on to define "germane" broadly, observing:

> It is true that it may be sometimes difficult to say whether a given duty, devolved by statute upon a named officer, has regard to the civil or military service of the United States. *Wales v. Whitney*, 114 U.S. 564, 569 [5 S.Ct. 1050, 1052, 29 L.Ed. 277 (1885)]; *Smith v. Whitney*, 116 U.S. 167, 179, 181 [6 S.Ct. 570, 576, 577, 29 L.Ed. 601 (1886)]. But, in the present case, the duty which the military officers in question were called upon to perform cannot fairly be said to have been dissimilar to, or outside of the sphere of, their official duties.

147 U.S. at 301, 13 S.Ct. at 391.

Appellant argues that "the offices already held by them" were the specific offices of Chief of Engineers and Engineer Commissioner for the District of Columbia, and not the underlying office of military officer. A careful reading of *Shoemaker* requires that we reject that argument for two reasons. First, *Shoemaker* specifically referred to "the duty which the *military officers* . . . were called upon to perform." (Emphasis added.) Second, the two cases cited in *Shoemaker* both dealt with the scope of military duties in general, not the specific duties of the

positions held by the military officers. *Wales* addressed the question whether the medical duties of the Navy Surgeon General were "military" as opposed to "civil" duties. *Smith* addressed the issue whether the fiscal duties of the Navy Paymaster-General were of a civil or military nature.

The principle we glean from *Shoemaker* is that Congress may create a new office (*e.g.*, Rock Creek Park Commissioner) and give a military officer the duties of that office without making a new appointment necessary, if the new duties are "germane" to the military duties of that officer. Applied to this case, it means that a second "judicial" appointment is not required if: (1) Congress did not create a new "office"; or (2) Congress created a new office, but the duties of that office are "germane" to the duties of the military officer detailed to perform them. A second appointment would be required if Congress created a new office and the duties of that office were not germane to the duties of the military officer detailed to perform them.

II. Military Judges

A court-martial is a temporary court, called into existence by a military order and dissolved when its purpose is accomplished. *See* Arts. 22, 23, and 24, UCMJ, 10 USC §§ 822, 823, and 824, respectively (prescribing who may convene courts-martial). Its constitutional origin is based on the congressional authority to govern the armed forces set out in Article 1, § 8, clause 14. As Colonel Winthrop explains, "Courts-martial of the United States, although their legal sanction is no less than that of the federal courts, being equally with these authorized by the Constitution, are, unlike these, not a portion of the Judiciary of the United States, and are thus not included among the 'inferior' courts which Congress 'may from time to time ordain and establish.'" W. Winthrop, *Military Law and Precedents* 49 (2d ed. 1920 Reprint).

Military judges perform duties prescribed by statute and the executive order when detailed to a specific court-martial. *See* Art. 26; Exec. Order No. 12473, April 13, 1984, 49 Fed.Reg. 17,152 (promulgating the new Manual for Courts-Martial); RCM 801-1011, 1102, 1104, Manual for Courts-Martial, United States, 1984. Military judges have no inherent judicial authority separate from a court-martial to which they have been detailed. When they act, they do so as a court-martial, not as a military judge. Until detailed to a specific court-martial, they have no more authority than any other military officer of the same grade and rank. To the extent that they perform judicial duties such as authorizing searches and reviewing pretrial confinement, their authority is not inherent but is either delegated or granted by executive order. *See* Mil.R.Evid 315(d)(2), Manual, *supra* (military judge may authorize searches *if* authorized by regulations of Secretary of Defense or Secretary concerned); RCM 305(g) (military judge may release from confinement); RCM 305(i)(2) and RCM 305(j) (military judge may review propriety of pretrial confinement).

To resolve the granted issue with respect to military judges, we must answer two questions: (1) Did Article 26 create a new office of "military judge"?; and (2) If so, are the duties of the new office germane to the duties of the military officer detailed as a military judge of a general court-martial or special court-martial?

A. New Office

After examining the history and evolution of the military judge, set out in greater detail below, we conclude that Congress did not create a new "office" when it enacted: the Articles of War (AW) in 1920 (requring that a "law member" be detailed to every general court-martial—AW 8); or the Uniform Code of Military Justice of 1950 (requiring detail of a "law officer" to every general court-martial—Art. 26, 50 USC § 590); or the Uniform Code of Military Justice of 1968 (redesignating

the law officer as the military judge—Art. 26, 10 USC § 826).

As the position of military judge has evolved, the military judge has acquired virtually all the duties previously performed by the president and members of a court-martial. Prior to the 1920 amendments to the Articles of War, the president of a court-martial, who usually was not a lawyer, presided over the trial. *See* para. 89, Manual for Courts-Martial, U.S. Army, 1917. In 1920, AW 8 was amended to require that a "law member" be detailed to general courts-martial in the Army. 41 Stat. 787, 788. AW 31 was amended in 1920 to transfer some duties of the president to the law member. It also provided that the law member ruled finally on questions of admissibility of evidence but could be overruled by a majority of the court members on other interlocutory questions. Until 1951, the Navy and Coast Guard continued the pre-1920 practice of using non-lawyers to preside over courts-martial and decide interlocutory questions. *See* §§ 381 and 370, Naval Courts and Boards, 1937; para. 385(t), Manual for Courts-Martial, U.S. Coast Guard, 1949 at 134.

When the Uniform Code of Military Justice, Pub.L. No. 81-506, 64 Stat. 108, codified in 50 USC §§ 551-736, recodified in 10 USC §§ 801-940 (1956), became effective in May 1951, the law member was redesignated as the law officer and additional duties were transferred from the president of the court to the law officer. All military services were required to "appoint" a law officer to general courts-martial. *See* Art. 26. Nonlawyers continued to preside over special courts-martial, Art. 51, UCMJ, 50 USC § 626, recodified in 10 USC § 851 (1956). This changed when the Military Justice Act of 1968, Pub.L. No. 90-632, § 2(9), 82 Stat. 1335, 1336, became effective in August 1969.

The Military Justice Act of 1968 changed the title of the law officer to military judge, in order to increase his

stature, and transferred more duties from the president of the court-martial to the military judge. *See* Art. 26, 82 Stat. 1336. Since the Act merely transferred authority and duties from one official of the court-martial to another and renamed the law officer, it did not create a new office.[2] As the Supreme Court explained in *Shoemaker*, "It cannot be doubted, and it has frequently been the case, that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed." 147 U.S. at 301, 13 S.Ct. at 391.

The Military Justice Act of 1968 also amended Article 16, UCMJ, 10 USC § 816, to authorize an accused to request trial by a court-martial composed of only a military judge. 82 Stat. 1335. When trying a case without members, the military judge sits as a one-member court-martial. A one-member court-martial was not new to military justice. *See* Art. 16(3), UCMJ, 50 USC § 576 (1950), recodified in 10 USC § 816(3) (1956) (summary court-martial); AW 7 (1916) (summary court-martial); Art. 64(b), Articles for the Government of the Navy (AGN) (1909) (deck court). When sitting as a one-member general court-martial or special court-martial, the military judge's authority is derived from the court-martial to which he is detailed, not from his status as a military judge. His authority is limited to that of the court-martial to which he has been detailed, and he may act only with respect to the cases referred to that court-martial. We conclude that the amendment of

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[2] In *United States v. Graf, supra,* this Court said, in dicta, *id.* at 455, that Congress "created" the military judge and the Courts of Military Review by enacting the Military Justice Act of 1968. We did not intend this imprecise dicta to hold that Congress created a new "office" in 1969, when the Act became effective.

Contrary to a dissenter's assertion that this view demeans military judges at 260 (Wiss, J., dissenting), we believe that our opinion merely recognizes the awesome life-and-death authority traditionally entrusted to military officers.

Article 16 did not create a new office but merely altered the composition of general courts-martial and special courts-martial.

Likewise, the amendment of Article 39(a), UCMJ, 10 USC § 839(a), effective in 1969, authorizing the military judge to hold sessions outside the presence of the members to dispose of interlocutory motions, arraign the accused, receive pleas, and dispose of other procedural matters not requiring the presence of the members, did not create a new office. The purpose and effect of Article 39(a) was to avoid wasting the time of the members by requiring them to sit idly by while the military judge disposed of legal and procedural issues. S.Rep. No. 1601, 90th Cong., 2d Sess. 10 (1968), U.S.Code Cong. & Admin. News 1968, 4501. Article 39(a) did not confer new duties on the military judge; it merely authorized him to discharge those duties without wasting the time of the court members.

Since a new office was not created by the Military Justice Act of 1968, a second "judicial" appointment was not necessary for military judges. Accordingly, we hold that the military judge in appellant's case was not appointed in violation of the Appointments Clause.

B. Germane Duties

Assuming, *arguendo*, that a new office was created at some time during the evolution of the military judge, the result is the same, because the duties of the military judge are the same as those traditionally performed by military officers serving as members of courts-martial. As such, they are germane to the duties of a legally trained military officer. *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361. Just as the duties of a Rock Creek Park Commissioner were germane to the duties of a military engineer, presiding over courts-martial is clearly germane to the duties of a military lawyer. Accordingly, a new appointment would not be required even if a new office was created.

III. Appellate Military Judges

In order to resolve the granted issue with respect to appellate military judges, we must address three questions: (1) Did Congress create a new office?; (2) If Congress created a new office, are the duties of that office germane to the duties of the military officer detailed to perform them?; and (3) What is the significance of the provision in Article 66(a) authorizing civilian members on boards of review and their successors, the Courts of Military Review?

A. New Office.

Appellant contends that Congress established a new office by creating an intermediate appellate court for each service. We hold that a new office was created when boards of review were established.

Prior to 1920, there were no appellate military courts. Appellate review of courts-martial was accomplished by a hierarchy of reviewing, supervisory, and confirming authorities, all of whom were military commanders, cabinet officers, or the President. In 1920, the Articles of War, applicable only to the Army, were amended by enactment of AW 50½, which mandated: "The Judge Advocate General shall constitute, in his office, a board of review consisting of not less than three officers of the Judge Advocate General's Department." The board of review was required to examine every record of trial involving a sentence which required "approval or confirmation by the President." Furthermore, "execution of any . . . sentence of a general court-martial involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary," required review by the board of review and the Judge Advocate General. If the Judge Advocate General disagreed with the decision of the board of review, the record would be transmitted to the Secretary of War for the action of the President. AW 50½. On the other hand, special courts-martial and summary courts-martial

were reviewed only by the officer appointing the court. AW 36 (1920). After the 1948 amendments of the Articles of War, effective February 1, 1949, certain Army and Air Force general court-martial cases were reviewed by a board of review, a Judicial Council composed of three general officers of the Judge Advocate General's Corps, and the Judge Advocate General. *See* AW 50 (1948).

Prior to 1951, a Navy general court-martial was reviewed by "the commander of the fleet or officer ordering the court." 53d AGN (1934). A summary court-martial (the counterpart of the modern special court-martial) was reviewed "by the officer ordering the court . . . and by his immediate superior in command." 32d AGN. A sentence "extending to the loss of life, or to the dismissal of a commissioned or warrant officer" required confirmation by the President. 53d AGN. A deck court (the counterpart to the modern summary court-martial) was reviewed by the officer who ordered it. AGN 64(d). Reviewing authorities were required to examine jurisdictional issues, the legal sufficiency of the pleadings, objections to evidence, and the legal sufficiency of the evidence. *See, e.g.*, § 472, Naval Courts and Boards, 1937.

Prior to 1951, a Coast Guard deck court was reviewed "by the officer ordering" it and then was forwarded to Coast Guard Headquarters, where it was "reviewed for legality . . . with the same force and effect as though an appeal had been taken." The Commandant of the Coast Guard was authorized to take whatever action "the interests of justice and equity may require." The accused had a "right to appeal to the Secretary of the Treasury from a decision of a deck court." Arts. 31 and 36, Manual for Courts-Martial, U.S. Coast Guard, 1949. All other courts-martial were reviewed by the Secretary of the Treasury, and the President in the case of dismissal of an officer. 14 USC § 564(d) (1949); Art. 140, Manual, USCG, *supra*. No Coast Guard court-martial could impose a sentence exceeding a discharge, confinement for

5 years, forfeiture, and reduction. 14 USC § 564(b) and (c); *see* Art. 50, Manual, USCG, *supra*.

After the Uniform Code of Military Justice became effective in 1951, convening authorities in all services retained the authority and responsibility to review the record of trial for legal sufficiency. *See* Art. 64, 50 USC § 651, recodified in 10 USC § 864 (1956) ("[T]he convening authority shall approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct in law and fact. . . .").

The 1950 Code made boards of review mandatory for the Navy, Marine Corps, and Coast Guard. They were already mandatory for the Army by virtue of AW 50½, enacted in 1920. This AW was made applicable to the Air Force by 62 Stat. 1014 (1948), codified in 5 USC § 627k (1948). Article 66(a) (1950) mandated:

> The Judge Advocate General of each of the armed forces shall constitute in his office one or more boards of review, each composed of not less than three officers or civilians, each of whom shall be a member of the bar of a Federal court or of the highest court of a State of the United States.

Effective in 1969, Article 66(a) was revised to its present language, as follows:

> Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. . . . Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. . . .

Boards of Review were a new entity, created by Congress for the Army in 1920, the Air Force in 1948, and

the Naval services in 1951. For the first time, there was a level of formal appellate review beyond the officer who convened the general court-martial. Also, for the first time, a permanent military tribunal was established, as compared to courts-martial which are temporary entities. Article 66 vested no discretion in the Judge Advocates General; boards of review were mandatory. We are satisfied that Congress, acting indirectly through the Judge Advocates General, created a new office by establishing boards of review. *Cf. Dettinger v. United States*, 7 MJ 216 (CMA 1979) (Congress, acting through Judge Advocate General, created Court of Military Review).

Unlike the Court of Military Appeals, created in 1950 as an instrument of civilian oversight imposed upon the military services, the boards of review were intended as military tribunals constituted by competent military authority from within each service. The mandate to each Judge Advocate General to "constitute" boards of review was consistent with the traditional practice of vesting the authority and responsibility for constituting military tribunals in military officers and giving them the authority to appoint the members.

That Congress intended the boards of review to be tribunals of a different nature from the Court of Military Appeals is apparent both from the language of the statutes creating them and the legislative history. The statute first creating the Court of Military Appeals used traditional language for creating a civilian Article I court: "There is hereby established a Court of Military Appeals. . . ." Art. 67(a)(1), 64 Stat. 129 (1950). In 1969 the provision was amended to read: "There is a United States Court of Military Appeals established under article I of the Constitution of the United States. . . ." Finally, in Article 141, 10 USC § 941 (1989) Congress described the Court's status as follows: "There is a court of record known as the United States Court of Military Appeals. The court is established under article I of the Constitution." This is virtually the identical

language used by Congress to create other Article I courts. *See* 26 USC § 7441 ("There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court."); 38 USC § 7251 ("There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Veterans Appeals."). The language creating the boards of review was substantially different: "The Judge Advocate General of each of the armed forces shall constitute in his office one or more boards of review. . . ." 50 USC § 653 (1950), recodified in 10 USC § 866 (1956).

This difference in language was not accidental. Indeed, in 1966, Senator Sam Ervin held hearings on a bill to establish a Court of Military Review in each service which would have been appointed by the service secretary and whose judges, both military and civilian, would have served for a fixed term of office. That bill used language similar to the organic statutes for the Court of Military Appeals, the Tax Court, and the Court of Veterans Appeals. It would have amended Article 66(a) to read: "There is established for each military department an appellate court. . . . Each such court is a court of record and shall be known as the Court of Military Review for the military department for which it is established." Joint Hearings before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm. and the Special Subcomm. of the Senate Armed Services Comm., 89th Cong., 2d Sess. 497-98 (1966). The bill was not enacted. Two years later, Article 66(a) in its present form was enacted.

The Senate Hearings on the 1950 Code reveal the intent of the drafters to use military expertise on the boards of review. The following exchange between Senator Kefauver and Professor Morgan is instructive:

> SENATOR KEFAUVER. . . . May I ask at this point, was there any difference of opinion on the part

> of the committee or extensive discussion as to whether each service should have its own reviewing section?
>
> MR. MORGAN. No; the committee was unanimous on that, so far as the board of review is concerned.

The notion was that each service would know more about the customs of the service, and all that sort of thing, and that the Judge Advocate General of that particular service would be the man that would be most competent to handle that thing from the point of view of this board of review, because the board of review, now, has very extensive powers.

Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Armed Services Comm., 81st Cong., 1st Sess. 42 (1949).

The amendments enacted in 1968 to Article 66(a) did not change the character or authority of the boards of review but merely completed the evolution by calling them what they were: appellate courts composed of appellate military judges. The legislative history of the 1968 amendment reflects that the redesignation of boards of review as a Court of Military Review was only a name change, designed to enhance the stature of the board of review by calling it a court and calling its members judges. This change was consistent with redesignating law officers as military judges. *See* S.Rep. No. 1601, 90th Cong., 2d Sess. 3, 14 (1968); The Army Lawyer: A History of The Judge Advocate General's Corps, 1775-1975 at 247 (U.S. Gov't. Printing Office). Certain organizational changes were mandated to improve efficiency and protect the independence of appellate military judges; but no new authority was conferred, no new duties imposed, and no new appointment procedures for appellate military judges were established.

B. Germane Duties

Turning the second question, we observe that military officers traditionally have been responsible for legal review of court-martial convictions in their capacities as reviewing and supervisory authorities. Prior to the creation of boards of review, military commanders were responsible for the legal review of courts-martial convened by them or their subordinates. *See* 53d AGN (1934) (record reviewed by "commander of the fleet or officer ordering the court"); 32d AGN (1934) (summary court-martial reviewed by "officer ordering the court" and "his immediate superior in command"); AW 46 and 47 (1920) (record reviewed by convening authority); para. 35, Manual for Courts-Martial, U.S. Coast Guard, 1949 (deck court reviewed by Commandant of Coast Guard); § 472, Naval Courts and Boards, 1937 (commander reviewing the record must examine jurisdictional issues, legal sufficiency of pleadings, objections to evidence, and legal sufficiency of evidence).

A cadre of legally trained officers existed in each of the services prior to 1920. The language of Article of War 50½ and Article 66 of the Code reflect that Congress had this cadre of legally trained officers in mind when boards of review were first created in 1920 and extended to all the services in 1951. Congress considered the duties of the boards of review not only germane to military duties, but particularly appropriate for military lawyers. We hold that the duties of the newly-created boards of review were "germane" to the duties of the legally trained military officers contemplated by AW 50½ and Article 66 of the Code; therefore, we hold that a second judicial appointment is unnecessary.

C. Civilian Members

Turning finally to the significance of the provision for civilian members, the legislative history of Article 66(a) reflects that the historical antecedent of the boards of re-

view created by Article 66(a) was the Army board of review, composed of military officers, which was created by AW 50½. The provision for civilian members was not included in AW 50½, but was added to Article 66(a) at the request of the Coast Guard. During the 1949 hearings on the proposed Uniform Code of Military Justice, Mr. Larkin explained the provision for civilian members as follows:

> Well, they were included initially at the request of the Coast Guard—not that it be worded this specific way but the Coast Guard does have civilian lawyers working in their court-martial procedures during peacetime, and they feel they are very competent.
>
> They don't have an unusually large number of officers in their review, and they wanted to be free if they desired to appoint a civilian lawyer working for the Coast Guard to a board of review. This was the easiest way to make that provision.

Hearings on H.R. 2498 before a Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess. 1189 (1949), *reprinted in Index and Legislative History, Uniform Code of Military Justice* (1950).

In appellant's case we need not decide whether Congress inadvertently exceeded its authority by vesting the powers of an "Officer of the United States" in civilians who had not been appointed in accordance with the Appointments Clause, because no civilians participated in the appellate review of his case. We regard the provision for civilian members of boards of review and their successors, the Courts of Military Review, as severable from the remainder of Article 66(a). Congress had two purposes in enacting Article 66(a). The primary purpose was to make boards of review mandatory for all services. The secondary purpose was to accommodate the Coast Guard by authorizing civilian members on boards of review. Where a statute attempts to accom-

plish two or more objects, it may be valid as to one and invalid as to others, as long as its purpose can be accomplished by the valid part and is not dependent upon or conditioned by the invalid part. *Sutherland Stat. Const.* § 44.07 at 503-04 (4th Ed.1986 Revision).

D. Conclusion

Applying the *Shoemaker* analysis to appellant's case, we hold that appellate military judges need not be reappointed to perform judicial duties because judicial duties are "germane" to the offices already held by them as legally trained commissioned officers of their respective armed forces. Accordingly, we hold that appointment of the appellate military judges who reviewed appellant's case was consistent with the Appointments Clause.

We have not addressed the desirability of a legislative requirement that trial and appellate military judges be specifically appointed as judges by the President, a Court of Law, or the Head of a Department, and we consider it inappropriate to do so. Congress has the power to require a second "judicial" appointment if considered desirable. Congress considered such a measure in 1966 but did not enact it. We decide only that a second "judicial" appointment was not constitutionally required for the trial and appellate judges involved in appellant's case. As we stated in *United States v. Henderson*, 34 MJ 174, 178 (CMA 1992), "As a court . . . we are not involved in the merits of . . . policy. We interpret statutes, and we can strike them down only when they violate the Constitution."

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Judge COX concurs.

CRAWFORD, Judge (concurring in the result):

The lead opinion has put forward a thoughtful and well-reasoned analysis of how Article II, section 2, paragraph 2, clause 2, of the United States Constitution is not violated by the present manner of selecting military judges. However, I part ways with the underlying premise of the lead opinion that the Appointments Clause applies to the selection of a military judiciary and therefore can only concur in the result.

In concluding that the Appointments Clause does not apply either to selection of military trial or military appellate judges, one of necessity must engage in both an historical and a contemporary analysis of the Constitution and its Appointments Clause. In applying both approaches, the intentions of the Framers can be determined from documents that are available. *See, e.g.*, 4 P. Kurland & R. Lerner, *The Founders' Constitution* (hereafter Kurland) (1987); J. Harris, *The Advice and Consent of the Senate* (hereafter Harris) 25-30 (1953).

A. The Historical Approach

At the time of the Constitutional Convention in Philadelphia from late May to mid-September 1787, no thought was given to how the Appointments Clause should be applied to military trial and appellate judges. Kurland, *supra* at 28-38. Two major themes dominated the debates which shaped the Appointments Clause. First, those who opposed a strong executive resisted giving the chief executive the nomination authority over the national judiciary without some sort of Council to screen the appointment process. Second, those who opposed a strong legislature feared that if the appointment authority was given to the legislative branch, the appointment of a national judiciary would fall into the hands of certain factions. Harris, *supra* at 25-30.

At the time of these debates there was no military judiciary in place, that function being served by military

officers. There was, however, a great deal of debate and attention paid to a federal civilian judiciary as evidenced by Alexander Hamilton's discussions in *The Federalist Papers*, Nos. 78 through 83.[1] Thus, historically, the Founding Fathers gave no explicit consideration to including a military judiciary within the ambit of the Appointments Clause.

B. The Contemporary Approach

A contemporay approach to reviewing our Constitution and its provisions looks at the intent of the Framers and the interests and values they meant to protect.

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[1] No. 78, "A VIEW OF THE CONSTITUTION OF THE JUDICIAL DEPARTMENT IN RELATION TO THE TENURE OF GOOD BEHAVIOR," wherein Hamilton discusses "the doctrine of judicial review," stating: "Whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former."

No. 79, "A FURTHER VIEW OF THE JUDICIAL DEPARTMENT IN RELATION TO THE PROVISIONS FOR THE SUPPORT AND RESPONSIBILITY OF THE JUDGES," wherein Hamilton expresses "[t]houghts on the salary, tenure, accountability, and age of judges."

No. 80, "A FURTHER VIEW OF THE JUDICIAL DEPARTMENT IN RELATION TO THE EXTENT OF ITS POWERS," wherein "Hamilton traces the outlines of the judicial power."

No. 81, "A FURTHER VIEW OF THE JUDICIAL DEPARTMENT IN RELATION TO THE DISTRIBUTION OF ITS AUTHORITY," wherein Hamilton "states the case for a distinct, learned, independent Supreme Court, then speculates on the relations of the Supreme Court to the lower courts."

No. 82, "A FURTHER VIEW OF THE JUDICIAL DEPARTMENT IN REFERENCE TO SOME MISCELLANEOUS QUESTIONS," wherein Hamilton discusses "the relations of the federal and State courts."

No. 83, "A FURTHER VIEW OF THE JUDICIAL DEPARTMENT IN RELATION TO THE TRIAL BY JURY," wherein "Hamilton attempts . . . to quiet the fears of" some with a discussion "of this ancient 'palladium of free government.' "

The Federalist Papers, xxx-xxxi (A. Hamilton, J. Madison, J. Jay) (C. Rossiter 1961).

A contemporary reading of the Constitution is important because as John Marshall stated: "[I]t is a constitution we are expounding." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 4 L.Ed. 579 (1819). The Constitution is a living document and "states or ought to state not rules for the passing hour, but principles for an expanding future," B. Cardozo, *The Nature of the Judicial Process* 83 (Yale Univ. Press 1921), and "a principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems v. United States*, 217 U.S. 349, 373, 30 S.Ct. 544, 551, 54 L.Ed. 793 (1910).

Utilizing a contemporary analysis I start by asking what interests and values were meant to be protected by the Appointments Clause. It is undisputed that the Appointments Clause was designed as a series of checks and balances between the Executive and Legislative Branches on the creation and filling of offices. Kurland, *supra*, 424 U.S. at 33. The Framers were concerned with a division of power to prevent one branch from becoming more powerful than the other.

The debates among the Framers over appointments authority in general and judicial appointments in particular bear out their desire for checks and balances as well as for qualified appointees. Edmund Randolph of Virginia argued that if appointment authority was in the legislative branch, this "generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications." Whereas George Mason, also of Virginia, argued that, if the appointment to the judiciary was with the executive, it was "a dangerous prerogative. It might even give him an influence over the Judiciary department itself." *Id.* at 33.

Alexander Hamilton of New York thought that giving the Senate approval authority over nominations would be a check on the "spirit of favoritism of the President"

and would work against the appointment of unqualified individuals or individuals selected because of a family connection or personal attachment. Harris, *supra* at 28. Hamilton argued that to empower the legislature with appointment authority would just lead to "intrigue and cabal." *Id. Cf. Kurland, supra* at 31. Nathaniel J. Ghorum (also spelled Gorham in some texts) of Massachusetts thought it best that the Executive be responsible for appointment because "he will be careful to look through all the States for proper characters." *Id.* at 31. To prevent dependency on a single individual making the appointment, some Framers thought it best to have the Senate vote on the appointments. Others were concerned that a Senate vote would mean too "much fettering [in] the Senate." *Id.* at 32. Eventually the Framers settled on appointments by the executive with the advice and consent of the Senate.

In defense of the appointment power enunciated in the Constitution, Alexander Hamilton in *The Federalist* No. 66 commented as follows on how the appointment power would work:

> It will be the office of the president to *nominate*, and with the advice and consent of the senate to *appoint*. There will of course be no exertion of *choice* on the part of the senate. They may defeat one choice of the executive, and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice, he may have made. They might even entertain a preference to some other person, at the very moment they were assenting to the one proposed; because there might be no positive ground of opposition to him; and they could not be sure, if they withheld their assent, that the subsequent nomination would fall upon their own favourite, or upon any other person in their estimation more meritorious than the one rejected. Thus it could hardly happen that the majority of the sen-

> ate would feel any other complacency towards the object of an appointment, than such, as the appearances of merit, might inspire, and the proofs of the want of it, destroy.

The Federalist: A Collection of Essays Written in Favour of The New Constitution, vol. II at 218-19 (J. and A. McLean, New York, 1788) (hereafter cited as McLean).

Thus the interests and values of providing for the selection of officers, including judicial officers, based on merit and dividing power between the executive and legislative branches gave birth to the Appointments Clause. The question remains whether, in order to protect those interests and values, it is necessary to select military trial and appellate judges pursuant to the Appointments Clause. In order to answer that question we must also examine the additional interests and values unique to national security and military matters which the Framers sought to protect. In so doing we can determine whether these other factors justify treating the military judiciary different from the federal civilian judiciary and thereby render the Appointments Clause inapplicable to military judges.

C. Analysis

Because of national security interests and concerns for unforeseen military exigencies, it was the intent of the Framers to vest great authority over these matters in Congress. L. Tribe, *American Constitutional Law* 353-56 (2d ed. 1988). They accomplished this in the Constitution through the enumerated powers of Article I, Section 8, Clauses 11 through 16 and 18. Under the enumerated powers, Congress has the power to "raise and support Armies" (cl. 12); "provide and maintain a Navy" (cl. 13); "make Rules for the Government and Regulation of the land and naval Forces" (cl. 14); and

"make all laws that are . . . . necessary and proper" (cl. 18).

The rationale for this approach by the Framers is found in Alexander Hamilton's *Federalist* No. 23:

> The authorities essential to the care of the common defence are these—to raise armies—to build and equip fleets—to prescribe rules for the government of both—to direct their operations—to provide for their support. These powers ought to exist without limitation: *Because it is impossible to foresee or define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.*[*] The circumstances that endanger the safety of nations are infinite; and for this reason, no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils, which are appointed to preside over the common defence.
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> * * * *
>
> Whether there ought to be a federal government intrusted with the care of the common defence is a question, in the first instance, open to discussion; but the moment it is decided in the affirmative, it will follow, that that government ought to be cloathed with all the powers requisite to the complete execution of its trust. And unless it can be shewn, that the circumstances which may affect the public safety are reducible within certain determinate limits; unless the contrary of this position can be fairly and rationally disputed, it must be admitted as a necessary consequence, that there can be no limitation of that authority, which is to provide for the defence and protection of the community, in any matter es-

> sential to its efficacy; that is, in any matter essential to the *formation*, *direction* or *support* of the NATIONAL FORCES.

McLean, *supra*, vol. I at 144-45 (some emphasis [*] added).

This view was underscored by James Madison in *The Federalist* No. 41:

> But was it necessary to give an INDEFINITE POWER of raising TROOPS, as well as providing fleets; and of maintaining both in PEACE, as well as in WAR?
>
> The answer to these questions has been too far anticipated, in another place, to admit an extensive discussion of them in this place. The answer indeed seems to be so obvious and conclusive as scarcely to justify such a discussion in any place. With what colour of propriety could the force necessary for defence, be limited by those who cannot limit the force of offence? If a federal Constitution could chain the ambition, or set bounds to the exertions of all other nations, then indeed might it prudently chain the discretion of its own government, and set bounds to the exertions for its own safety.

McLean, *supra*, vol. II at 39.

Yet the Framers, mindful of the new nation's fears regarding establishment of a standing armed force in peacetime, S. Padover, *To Secure These Blessings* 202-08 (1962), did not propose to give the new executive and legislature this great authority without some limitation. Article I, Section 8, Clause 12, gives Congress the authority to "raise and support Armies" but also provides that "no Appropriation of Money to that Use shall be for a longer Term than two Years." In *The Federalist* No. 26, Alexander Hamilton puts forth a spirited defense of this clause that limits appropriations for military purposes to two Years:

> The legislature of the United States will be *obliged* by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter, by a formal vote in the face of their constituents. They are not *at liberty* to vest in the executive department permanent funds for the support of an army; if they were even incautious enough to be willing to repose in it so improper a confidence. As the spirit of party, in different degrees, must be expected to infect all political bodies, there will be no doubt persons in the national legislature willing enough to arraign the measures and criminate the views of the majority. The provision for the support of a military force will always be a favourable topic for declamation. As often as the question comes forward, the public attention will be roused and attracted to the subject, by the party in opposition: And if the majority should be really disposed to exceed the proper limits, the community will be warned of the danger, and will have an opportunity of taking measures to guard against it. Independent of parties in the national legislature itself, as often as the period of discussion arrived, the state legislatures, who will always be not only vigilant, but suspicious and jealous guardians of the rights of the citizens, against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers and will be ready enough, if any thing improper appears to sound the alarm to the people and not only to be the VOICE, but, if necessary, the ARM of their discontent.

McLean *supra*, vol. I at 165-66.

An examination of the military judiciary, although similar to its civilian counterpart in the importance and

scope of its duties, also reveals marked dissimilarities from a civilian judiciary because of the ever-existent potential for military exigencies. "Military exigencies" is not a term of art; our armed forces are not a garrison force. In the past 4 years alone, our military men and women have deployed to Panama in Operation Just Cause and to Southwest Asia in Operations Desert Shield and Desert Storm. In addition, they have participated in the humanitarian mission to aid Kurdish refugees, Operation Provide Comfort, following Operation Desert Storm. Even as this opinion is being released, our troops are serving in Somalia as part of a relief effort called Operation Restore Hope.

These missions require worldwide deployment and the need for instant mobility and flexibility in assignments, including military judge assignments. Military judges must try cases in combat environments, and, due to the potential for military judge casualties, replacements must be available at a moment's notice. The ever-expanding role of the military only underscores the wisdom of our Founding Fathers in entrusting Congress with the authority and responsibility for providing for its day-to-day operations.[2]

In carrying out its enumerated responsibilities Congress has paid careful attention to the military justice system. Starting in 1950 with the adoption of the Uniform Code of Military Justice, Congress has been very active in expanding the status and power of the military judge. In

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[2] For example if during Desert Shield/Storm a scud missile hit a barracks housing one or more judges from the services, replacements would be needed immediately. A service Judge Advocate General looking for qualified individuals might select an individual from the Court of Military Review. Likewise, if there was a heavy case load before the Court of Military Review, for example, a series of classified cases, the Judge Advocate General should have the flexibility of assigning a trial judge not involved with those cases to the appellate court.

1950, Congress provided for the law officer who was the forerunner of the military trial judge. *See* Pub.L. No. 81-506, 64 Stat. 117. In the Military Justice Act of 1968, Pub.L. No. 90-632, 82 Stat. 1335, Congress provided for military judges (at 1336) and the Courts of Military Review (at 1341). *See generally* Cox, *The Army, The Courts, and The Constitution: The Evolution of Military Justice*, 118 Mil.L.Rev. 1 (1987); Criminal Law Note: *An Ongoing Trend: Expanding the Status and Power of the Military Judge*, The Army Lawyer 23 (Dept. of the Army Pamphlet 27-50-239, October 1992).

In addition to his or her constitutional role as Commander-in-Chief, U.S. Const. art. II, § 2, the President has a specific role for military justice matters. Pursuant to its authority under the Constitution, Congress, through Article 36(a), Uniform Code of Military Justice, 10 USC § 836(a) (1979), has given the President the authority to prescribe "[p]retrial, trial, and post-trial procedures, including modes of proof, for . . . [trials by] courts-martial." Based on this delegation of authority from Congress, the President has by Executive Order set forth many rules in the Manual for Courts-Martial, United States, 1984, that pertain to the authority of the military judge. *See generally* 1 F. Gilligan and F. Lederer, *Court-Martial Procedure* 514-56 (1991).

In fulfilling its responsibilities, Congress has been mindful of the interests sought to be protected by the Appointments Clause. First, with respect to selection of qualified individuals to serve as military judges, Congress has determined that these assignments be made by the Judge Advocate General of each service who has direct responsibility for military justice within his or her respective service.[3] Congress has implicitly recog-

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[3] Article 26(c), Uniform Code of Military Justice, 10 USC § 826(c), provides: "The military judge of a general court-martial

nized that the Judge Advocates General are uniquely situated to determine which officers are best qualified within their respective services to serve as both trial and appellate judges. Moreover, these same individuals have by necessity great flexibility to make these assignments [4] quickly in a combat environment where casualties or other exigencies may affect the military judiciary.

Second, with respect to establishing a system of checks and balances between the Executive and Legislative branches, it is difficult to see how the present system of assigning military judges jeopardizes that delicate balance. If anything, the creation by Congress in 1951 of the United States Court of Military Appeals, a federal civilian court subject to the Appointments Clause, which reviews decisions of the military judiciary, more than satisfies any concerns in that regard. *See* 64 Stat. 129. Additionally, effective August 1, 1984, Congress provided in Article 67(h)(1), UCMJ, 10 USC § 867(h)(1), now

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shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member. . . ."

Article 66(a), UCMJ, 10 USC § 866(a), provides: "Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges."

See also Morgan, *The Background of the Uniform Code of Military Justice*, 6 Vand.L.Rev. 169 (1953); Comments, *Military Justice and the Constitution—Improvements Offered by the New Uniform Code of Military Justice*, 29 Tex.L.Rev. 651 (1951).

[4] Article 6(a), UCMJ, 10 USC § 806(a), states:

> The assignment for duty of judge advocates of the Army, Navy, Air Force, and Coast Guard shall be made upon the recommendation of the Judge Advocate General of the armed force of which they are members. The assignment for duty of judge advocates of the Marine Corps shall be made by direction of the Commandant of the Marine Corps. The Judge Advocate General or senior members of his staff shall make frequent inspections in the field in supervision of the administration of military justice.

Article 67a, UCMJ, 10 USC § 867a (1989), that decisions of our Court are reviewable by the Supreme Court of the United States by writ of certiorari, Military Justice Act, Pub.L. No. 98-209, § 10(c)(2), 97 Stat. 1393, 1406, thereby providing the ultimate check on judicial decisions of the military justice system.

If there is dissatisfaction with the military justice system as it exists today, it can be changed or modified by the majoritarian process. That is, the elected representatives of Congress, in consultation with the Executive branch, have the power to make any necessary changes. But this Court must not, by judicial fiat, impose the procedures intended for a federal civilian judiciary upon the military under the guise of the Constitution. To do so would be to ignore the constitutional deference given to Congress by our Founding Fathers because of the realities and practicalities of national security exigencies.

D. Special Deference

Based on the intent of the Framers, the Constitution, and Federal statute, the Supreme Court has given great deference to the authority of Congress and the President in military matters. The Supreme Court has repeatedly recognized the power of Congress to provide for military justice. Judge Grace in *United States v. Prive*, 35 MJ 569, 573-74 (CGCMR 1992), has listed some of those decisions as follows:

Dynes v. Hoover, 61 U.S. (20 How.) 65, 79, 15 L.Ed. 838 (1858) ("These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations. . . .").

Ex parte Milligan, 71 U.S. (4 Wall.) 2, 123, 18 L.Ed. 281 (1866) ("Congress has declared the kinds of trial

[for offenses by soldiers] and the manner in which they shall be conducted. . . .").

Parker v. Levy, 417 U.S. 733, 743, 94 S.Ct. 2547, 2555, 41 L.Ed.2d 439 (1974) ("This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. . . . [T]he military has, again by necessity, developed laws and traditions of its own during its long history.")

Schlesinger v. Councilman, 420 U.S. 738, 757, 95 S.Ct. 1300, 1313, 43 L.Ed.2d 591, 609 (1975) ("The laws and traditions governing [military] discipline have a long history; . . . they are founded on unique military exigencies as powerful now as in the past. Their contemporary vitality repeatedly has been recognized by Congress.")

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 66, 102 S.Ct. 2858, 2869, 73 L.Ed. 2d 598 (1982) ("[T]he exercise by Congress and the Executive of the power to establish and administer courts-martial . . . involves a constitutional grant of power that has been historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue.")

In *United States v. Prive*, *supra* 35 M.J. at 576, Judge Grace summarized the effect of these decisions on the present issue by paraphrasing a statement from *Northern Pipeline* as follows:

> [T]hese precedents [of the Supreme Court] "represent no broad departure from the constitutional command that" *appointments must be made in accordance with the Appointments Clause.* Rather, they reduce to a narrow situation not subject to that command, that "recogniz[es] a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitution-

> ally so exceptional that the congressional assertion of power" *to designate military judges outside of the provisions of the Appointments Clause "was consistent with, rather than threatening to, the constitutional mandate of separation of powers.*"

See 458 U.S. at 64, 102 S.Ct. at 2868 (emphasis added).

Judge Grace also relied on this statement from *Solorio v. United States*, 483 U.S. 435, 447, 107 S.Ct. 2924, 2931, 97 L.Ed.2d 364 (1987):

> Decisions of this Court after *O'Callahan* [*v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969)] have also emphasized that *Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military.* As we recently reiterated, "'[j]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.'"

(Emphasis added and citations omitted.)

I agree with the Coast Guard Court of Military Review and "conclude that Congress, in legislating for the land and naval forces, may provide for the designation of judges within the military justice system in a manner not provided for in the Appointments Clause of the Constitution." 35 MJ at 577.

SULLIVAN, Chief Judge (dissenting):

I respectfully disagree with the lead opinion and Judge Crawford's separate opinion in this case. In my view the Constitution speaks clearly on the granted issue, and we are duty-bound to follow its supreme command. U.S. Const. art. VI. Military judges, both trial and appellate, are "inferior Officers" of the United States and must be appointed to their offices by "the President alone," or by this Court or one of the other "Courts of Law," or by the Secretary of Defense or one of the other "Heads of Departments." Art. II, § 2, para. 2, cl. 2. *See Freytag v. Commissioner of Internal Revenue*, 501 U.S. ——, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991). Appellant's military judges were not so appointed, but their status as *de facto* appointees might preclude reversal of his conviction. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598 (1982); *Buckley v. Valeo*, 424 U.S. 1, 142-43, 96 S.Ct. 612, 693, 46 L.Ed.2d 659 (1976). Nevertheless, I must dissent to the majority's simple affirmance of this case. *Id.*

More particularly, I do not believe that Congress' broad power to make rules for the land and naval forces under Article I, § 8, clause 14 of the Constitution is unlimited such that the Appointments Clause can be considered *per se* inapplicable to military justice legislation. *See generally Mistretta v. United States*, 488 U.S. 361, 382, 109 S.Ct. 647, 660, 102 L.Ed.2d 714 (1989). (Even Congress' primary duty to make laws is limited by the constitutional prohibition against an ex post facto Law-*e.g.*, Art. I, § 9, para. 3). A contrary opinion in my view is extremely dangerous in that it upsets the delicate system of checks and balances provided in our Constitution to ensure the American way of government.

I also would hold that commissioning and promoting military officers by the President by and with the advice

and consent of the Senate does not obviate the need for additional constitutional appointments of such persons for higher or more responsible offices both within and without the military department (*i.e.*, military trial judge or appellate judge). There is no blanket "commissioned officer" exception to the Appointments Clause written in the Constitution, and the decision of the Supreme Court in *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170 (1893), should not be broadly extended to create one for military officers who are simply "legally trained." In sum, consistent with my judicial philosophy of spurning judicial legislation, I also must reject the judicial constitution-making accomplished by the lead opinion in this case.

I

The Granted Issue

The issue raised by appellate defense counsel and granted review by this Court is as follows:

> WHETHER APPELLANT'S COURT-MARTIAL LACKED JURISDICTION WHERE THE MILITARY JUDGE WAS DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION, AND WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW WAS WITHOUT POWER TO REVIEW THIS CASE WHERE ITS JUDGES WERE DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION.

In this regard, I note that the judge in this trial was Major Edward F. Pesik, Jr., United States Marine Corps. He was certified in accordance with Article 26 (b), Uniform Code of Military Justice, 10 USC § 826 (b); sworn in accordance with Article 42(a), UCMJ,

10 USC § 842(a); and detailed to this case.[1] The appellate military judges in this case were Senior Judge James A. Freyer, a Navy Captain; Senior Judge Richard A. Strickland, a Marine Colonel; and Judge James E. Orr, a Navy Captain. These judges constituted Panel No. 1 of the Court of Military Review, and they reviewed appellant's case in accordance with that court's internal rules.

The issue of law raised by appellate defense counsel and granted by this Court focuses on the "designat[ion]" of the military judge who tried his case and the "designat[ion]" of the military appellate judges who heard his appeal. Appellant does not contend that these designations were accomplished in violation of the Uniform Code of Military Justice. Instead, he contends that they were not accomplished in accordance wih the Appointments Clause of the United States Constitution. Art. II, § 2, para. 2, cl. 2. Relying heavily on the recent Supreme Court decision in *Freytag v. C.I.R.*, *supra*, he asserts that military judges "are 'Officers of the United States'" who must be "appointed as such by the President, the Courts of Law, or the Head of a Department." Final Brief at 10. Finally, he asserts that the designation of these military judges by the Judge Advocate General of the Navy fails to satisfy this constitutional appointment standard.

II

The Statutes Establishing The Military Judge

A necessary step in resolving the granted issue is to understand the statutes which create the military trial and appellate judges and provide for persons to fill these judicial positions. At the outset I note that Congress has not expressly provided that a person be "appointed"

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[1] Appellant represents without opposition that Major Pesik was a "General Court-Martial qualified" judge and the Sierra Judicial Circuit's Chief Military Judge.

a military trial judge or appellate judge. However, in the version of the Uniform Code of Military Justice enacted in 1950, Congress did provide for "appoint[ment]" of a law officer, the statutory predecessor of the military judge, by appropriate convening authorities. *See* Art. 26(a), UCMJ, 50 USC § 590(a), recodified in 10 USC § 826(a) (1956). Furthermore, in the 1950 Code, Congress provided for "appoint[ment]" of judges of this Court "by the President, by and with the advice and consent of the Senate." Art 67(a), UCMJ, 50 USC § 654(a), recodified in 10 USC § 867(a) (1956); *see* Art. 142(b)(1), UCMJ, 10 USC § 942(b)(1) (1989). Despite Congress' obvious familiarity with the appointment terminology, it chose to create the military judge and provide for filling this government position with somewhat less direct language.[2]

I first note that, since 1969, Article 26(b) had provided that "[a] military judge shall be a commissioned officer of the armed forces." 10 USC § 531 further provides:

> § 531. **Original appointments of commissioned officers**
>
> (a) *Original appointments in the grades* of second lieutenant through colonel in the Regular Army,

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[2] What is an "appointment" for purposes of the Appointments Clause is a substantial constitutional question concerning separation of powers which implicates all three branches of our Government. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155, 2 L.Ed. 60 (1803). *See generally Buckley v. Valeo*, 424 U.S. 1, 122-24, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Moreover, in *Auffmordt v. Hedden*, 137 U.S. 310, 327, 11 S.Ct. 103, 108, 34 L.Ed. 674 (1890), the Supreme Court clearly held that Congress' use of the word "select" rather than "appoint" was but one factor to be considered in determining whether the Appointments Clause applied. Finally, in *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170 (1893), the Supreme Court impliedly held that designation of officers for additional duty requires compliance in some manner with the Appointments Clause.

> Regular Air Force, and Regular Marine Corps and in the grades of ensign through captain in the Regular Navy *shall be made by the President, by and with the advice and consent of the Senate.*

(Emphasis added.) *See also* 10 USC § 593 (appointment in reserves in commissioned grades below lieutenant colonel and commander by President alone).

The qualifications for original appointment are also statutorily established:

> **§ 532. Qualifications for original appointment as a commissioned officer**
>
> (a) Under regulations prescribed by the Secretary of Defense, an original appointment as a commissioned officer (other than as a commissioned warrant officer) in the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps may be given only to a person who—
>
> (1) is a citizen of the United States;
>
> (2) is able to complete 20 years of active commissioned service before his fifty-fifth birthday;
>
> (3) is of good moral character;
>
> (4) is physically qualified for active service; and
>
> (5) has such other special qualifications as the Secretary of the military department concerned may prescribe by regulation.

Article 26(b) (1969) also provides that a military judge must be "a member of the bar of a Federal court or a member of the bar of the highest court of a State." This requirement for legal training is somewhat less stringent than the requirement for detail as trial counsel or defense counsel at a general court-martial. *See* Art. 27(b), UCMJ, 10 USC § 827(b), which states:

> (b) Trial counsel or defense counsel detailed for a general court-martial—

(1) must be a *judge advocate who is a graduate of an accredited law school* or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State; and

(2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

(Emphasis added.)

I next note that Article 26(b) (1969) provides that a military judge must be "certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member." The standards for certification are not provided by statute, and there is no statutory requirement that a military judge be designated a member of the Judge Advocate General's Corps or a Marine Corps judge advocate. However, as a practical matter, military judges to be certified as qualified normally would have experience as a trial or defense counsel under Article 27(b). This statute alternatively requires designation as a "judge advocate."

In fact, the military judge who presided over this court-martial was a Marine judge advocate. *See* NAVMC P-1005, Officers on Active Duty in the Marine Corps at 1-43 (1 Oct.1989, 48th Rev.). 10 USC § 5587a provides:

§ 5587a. Regular Marine Corps: judge advocates

With the approval of the Secretary of the Navy, any regular officer on the active-duty list of the Marine Corps who is qualified under section 827(b) of this title *may, upon his application, be designated as a judge advocate.*

(Emphasis added.)

Moreover, two of the appellate military judges who heard his appeal before the Court of Military Review were members of the Navy Judge Advocate General's Corps. 10 USC § 5150 provides:

> **§ 5150. Staff corps of the Navy**
>
> (a) *The staff corps of the Navy are—*
>
> (1) the Medical Corps;
>
> (2) the Dental Corps;
>
> (3) *the Judge Advocate General's Corps;*
>
> (4) the Chaplain Corps; and
>
> (5) such other staff corps as may be established by the Secretary of the Navy under subsection (b).
>
> (b)(1) The Secretary of the Navy may establish staff corps of the Navy in addition to the Medical Corps, the Dental Corps, the Judge Advocate General's Corps, and the Chaplain Corps. *The Secretary may designate commissioned officers in, and may assign members to, any such staff corps.*

(Emphasis added.)

As indicated above, designation as a judge advocate does not determine where or when a commissioned officer serves this duty. Article 6, UCMJ, 10 USC § 806 (1984), further comments on the assignment for duty of judge advocates, as follows:

> **§ 806. Art. 6. Judge advocates and legal officers**
>
> (a) The *assignment for duty of judge advocates* of the Army, *Navy*, Air Force, and Coast Guard *shall be made upon the recommendation of the Judge Advocate General of the armed force of which they are members. The assignment for duty of judge advocates of the Marine Corps shall be made by direc-*

> *tion of the Commandant of the Marine Corps.* The Judge Advocate General or senior members of his staff shall make frequent inspections in the field in supervision of the administration of military justice.

(Emphasis added.) The legislative history makes clear that Congress intended the Judge Advocate General of each service to play a substantial initiating role in the assignment process while reserving to military personnel authorities the final say.[3] *See* Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess. 898-901 (1949), *reprinted in Index and Legislative History, Uniform Code of Military Justice* (1950).

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[3] 10 USC § 5013(g) provides:

> (g) The Secretary of the Navy may—
>
> (1) assign, detail, and prescribe the duties of members of the Navy and Marine Corps and civilian personnel of the Department of the Navy;
>
> (2) change the title of any officer or activity of the Department of the Navy not prescribed by law; and
>
> (3) prescribe regulations to carry out his functions, powers, and duties under this title.

10 USC § 5131 creates the Bureau of Naval Personnel and 10 USC § 5132 empowers it as follows:

> § 5132. Bureaus: distribution of business; orders; records; expenses
>
> (a) Except as otherwise provided by law, the business of the executive part of the Department of the Navy shall be distributed among the bureaus as the Secretary of the Navy considers expedient and proper.
>
> (b) Each bureau shall perform its duties under the authority of the Secretary, and its orders are considered as coming from the Secretary.
>
> (c) Under the Secretary, each bureau has custody and charge of its records and accounts.
>
> (d) Each bureau shall furnish to the Secretary estimates for its specific, general, and contingent expenses.

For members of the Marine Corps, these powers are vested in the Commandant of the Marine Corps. *See* 10 USC § 5043(e)(3).

Article 26(c) (1969) also provides that a "military judge of a general court-martial *shall be designated by the Judge Advocate General*, or his designee, of the armed force of which the military judge is a member *for detail* in accordance with regulations prescribed under subsection (a)." (Emphasis added.) The language of designation is not new (10 USC § 8067) and generally refers to "a special duty classification." *See* 1967 U.S.Code Cong. & Admin. News 2113, 2114. Again the actual assignment of a designated military judge to Navy-Marine Corps Trial Judiciary is impliedly left to military personnel authorities. *See* SECNAVINST 5813.6C (13 April 1979).[4]

Finally, Article 26(a) (1969), in providing for detailing military judges to hear particular cases, states:

> (a) A military judge shall be detailed to each general court-martial. *Subject to regulations of the Secretary concerned*, a military judge may be de-

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[4] 6. Organization. The Navy-Marine Corps Trial Judiciary is a naval activity as that term is defined in [U.S. Navy Regulations, 1973]. It is composed of the Office of the Chief Judge of the Navy-Marine Corps Trial Judiciary and such Judicial Circuits and their Branch Offices as may be established by the Judge Advocate General. The Judge Advocate General may also establish Judicial Areas, each consisting of two or more Judicial Circuits, for the purpose of providing an intermediate level of supervision within the Trial Judiciary. Expansion of the Navy-Marine Corps Trial Judiciary will come from current manpower resources as determined by the Chief of Naval Operations, the Commandant of the Marine Corps, and the Judge Advocate General, acting in coordination. The Marine Corps Special Court-Martial Judiciary is disestablished, and its members are members of the Navy-Marine Corps Trial Judiciary.

* * * *

8. Authority Over Organization, Functions and Administration. The Judge Advocate General is authorized to organize, administer, assign, and reassign functions to the Navy-Marine Corps Trial Judiciary and personnel attached thereto in accordance with [10 USC § 826 et. seq.].

> tailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.

(Emphasis added.) As noted in *United States v. Graf*, 35 MJ 450 (CMA 1992), these regulations provide that detailing will be accomplished by the Chief Judge, the circuit military judge, or the circuit military judge's designee. *See* §§ 0120a(1) (1987); 0130a(1) (1990), Manual of the Judge Advocate General of the Navy.

In sum, the President and the Senate make a person a commissioned officer; the Secretary of the Navy makes that commissioned officer a judge advocate; the Judge Advocate General qualifies and classifies that judge advocate as a military judge; the Chief of Naval Personnel or the Commandant of the Marine Corps assigns him a duty station; and the Secretary of the Navy provides regulations for his detail to a particular case within that duty assignment.

III

Constitutional Tension

In view of these empowering statutes, it is now appropriate to turn to the United States Constitution. *See Dynes v. Hoover*, 61 U.S. (20 How.) 65, 61 U.S. 65, 15 L.Ed. 838 (1858). Article I, § 8 of the Constitution provides:

> The Congress shall have Power
>
> * * * *
>
> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two years;

> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces[.]

In addition, I note that this same section of the Constitution further provides:

> The Congress shall have Power
>
> * * * *
>
> To constitute Tribunals inferior to the supreme Court;
>
> * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Clearly, these constitutional grants of authority are sufficient to provide for the above-noted statutory establishment of a military justice system with military trial and appellate judges. *See Solorio v. United States*, 483 U.S. 435, 441, 107 S.Ct. 2924, 2928, 97 L.Ed.2d 364 (1987); *Schlesinger v. Councilman*, 420 U.S. 738, 757-58, 95 S.Ct. 1300, 1313, 43 L.Ed.2d 591 (1975). *See also Rostker v. Goldberg*, 453 U.S. 57, 65-66, 101 S.Ct. 2646, 2652, 69 L.Ed.2d 478 (1981).

I also note the operative provisions of the Constitution which appellant asserts are applicable to the appointment of military judges. Article II states in pertinent part:

> Section 2. The President shall be Commander in Chief of the Army and Navy of the United States. . . .
>
> [*H*]*e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint* Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and *all other Officers of the*

> *United States, whose Appointments are not herein otherwise provided for and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.*

(Emphasis added.) Article II further states:

> Section 3. He shall . . . take Care that the Laws be faithfully executed, and *shall Commission all the Officers of the United States.*

(Emphasis added.)

In view of these provisions of the Constitution, three distinct but nonetheless related issues are raised which this Court must decide. First, can Congress create the position of military judge and provide for its filling under Article I, § 8 of the Constitution without regard to the Appointment Clause of Article II, § 2 of the Constitution? (*See* Parts IV and V, below.) Assuming it cannot, what does Article II, § 2 of the Constituion require for a proper constitutional appointment to the office of military judge? (*See* Part VI below.) Finally, does the statutory system of designation detail provided by Congress for military judges meet the above constitutional requirements? (*See* Part VII below.)

IV

The Scope of the Constitutional Power of Congress in Military Justice

It is beyond cavil that Congress has extremely broad powers to legislate in military matters generally and military justice matters in particular. Moreover, it is also quite clear that the Supreme Court has afforded great deference to Congress' decisions in this regard. The Coast Guard Court of Military Review has exhaus-

tively summarized the relevant Supreme Court cases supporting these assertions in its decision in *United States v. Prive*, 35 MJ 569, 573-75 (1992).

Despite these pronouncements, the Supreme Court has also made very clear that its deference to Congress in military matters is not absolute. *Rostker v. Goldberg*, *supra*, 453 U.S. at 67-68, 101 S.Ct. at 2653, states:

> None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause, *see Ex parte Milligan*, [71 U.S. (] 4 Wall. [)] 2, 18 L.Ed. 281 (1866); *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156 [40 S.Ct. 106, 108, 64 L.Ed. 194] (1919), but the tests and limitations to be applied may differ because of the military context. We of course, do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice. *See Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. [94] at 103 [93 S.Ct. 2080, 2087, 36 L.Ed.2d 772 (1973)]. In deciding the question before us we must be particularly careful not to substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.

Moreover, in *Middendorf v. Henry*, 425 U.S. 25, 96 S.Ct. 1281, 47 L.Ed.2d 556 (1976), the Supreme Court had earlier held that Congress' military justice powers were not totally independent of the rest of the Constitution. According to then-Justice Rehnquist:

> We recognize that plaintiffs, who have either been convicted or are due to appear before a summary court-martial, may be subjected to loss of liberty

or property, and consequently are entitled to the due process of law guaranteed by the Fifth Amendment.

However, whether this process embodies a right to counsel depends upon an analysis of the interests of the individual and those of the regime to which he is subject. *Wolff v. McDonnell*, 418 U.S. 539, 556, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935 (1974).

In making such an analysis, we must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. I, § 8, that counsel should not be provided in summary courts-martial. As we held in *Burns v. Wilson*, 346 U.S. 137, 140, 73 S.Ct. 1045, 1047, 97 L.Ed. 1508 (1953):

> "[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers especially entrusted that task to Congress." (Footnote omitted.)

425 U.S. at 43, 96 S.Ct. at 1291. *See also Solorio v. United States*, 483 U.S. at 451 n.18, 107 S.Ct. at 2933 n.18.

A question remains, however, whether Congress' power to make rules for the government and regulation of the Army and Navy is also limited or restricted by Article II, § 2, paragraph 2, clause 2 of the Constitution. The Coast Guard Court of Military Review in *United States v. Prive*, *supra*, has held that the Framers of the Constitution did not intend to include Congress' military justice power within the scope of the appointment clause. Relying on *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. at 63-70, 102 S.Ct. at 2867-71, it asserts that the military justice system is one of those "narrow situations . . . in which the grant of

power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers." *Id.* at 64, 102 S.Ct. at 2868 (plurality opinion). *See* 35 MJ at 575-76.

I disagree with the Coast Guard Court of Military Review for several reasons. First, the Supreme Court in *Northern Pipeline* held that the bankruptcy courts were not legislative courts properly excepted from compliance with the requirements of Article III of the Constitution. While it stated that courts-martial created by Congress under Article I, § 8 of the Constitution were legislative courts, and thus were not affected by Article III of the Constitution, it went no further. The additional leap taken by the Coast Guard Court of Military Review in extending this decision into the area of Article II and the Appointments Clause in disregard of the plain language of the Constitution is simply not justified. *See Mimmack v. United States*, 97 U.S. 426, 437, 24 L.Ed. 1067 (1878); *see also Wood v. United States*, 107 U.S. 414, 417, 2 S.Ct. 551, 554, 27 L.Ed. 542 (1883); *Blake v. United States*, 103 U.S. 227, 232, 26 L.Ed. 462 (1881); 30 Op.Atty.Gen. 177, 180 (1913); 4 Op.Atty. Gen. 603, 610 (1847). *See generally* 4 P. Kurland and R. Lerner, *The Founders' Constitution* 31-38, 98 (1987).

Second, the principle of separation of powers disputed in *Northern Pipeline* was between the congressional and judicial branches of our government. However, the Supreme Court in *Northern Pipeline* clearly recognized that the Constitution's exceptional plenary grant of power over the Nation's armed forces was to both the Legislative and Executive Branches of our Government. *Id.* 458 U.S. at 71, 102 S.Ct. at 2871. Accordingly, the *ratio decidendi* employed by the Supreme Court in *Northern Pipeline* cannot be logically applied to a dispute between

branches of the government which *both* historically and constitutionally share that very power. *See generally* E. Corwin, *The President: Office and Powers (1787-1984)* at 296 (5th rev. ed. 1984).

Finally, the Supreme Court in *Freytag v. C.I.R.*, 501 U.S. ——, 111 S.Ct. 2631, clearly recognized *two* concerns of the Framers of the Constitution in adopting the Appointments Clause of the Constitution. Justice Blackmun said:

> The roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political. Our separation-of-powers jurisprudence generally focuses on the danger of one Branch's aggrandizing its power at the expense of another Branch. *See Mistretta v. United States*, 488 U.S. 361, 382, 109 S.Ct. 647, 659, 102 L.Ed. 2d 714 (1989). The Appointments Clause not only guards against this encroachment *but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.*

Id. 501 U.S. at ——, 111 S.Ct. at 2638 (emphasis added).

More particularly, he later said:

> We cannot accept the Commissioner's assumption that every part of the Executive Branch is a department the head of which is eligible to receive the appointment power. *The Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may v st the power to appoint. The Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government. Given the inexorable presence of the administrative state, a holding that every organ in the Executive Branch is a department would multiply indefinitely the number*

> *of actors eligible to appoint. The Framers recognized the dangers posed by an excessively diffuse appointment power and rejected efforts to expand that power. See Wood*, at 79-80. So do we. For the chief judge of the Tax Court to qualify as a "Head of a Department," the Commissioner must demonstrate not only that the Tax Court is a part of the Executive Branch but also that it is a department.

Id. at ——, 111 S.Ct. at 2642 (emphasis added). This constitutional concern with Congress' excessive diffusion of the Executive's appointing power is simply not addressed by the *Northern Pipeline* rationale.

V

The Scope of the Constitutional Power of the Executive to Appoint Inferior Officers of the United States

The next inquiry concerns the actual scope of the Presidential appointment power. The general adage is that Congress creates the offices and the President appoints the necessary officers to fill them. *See generally* L. Tribe, *American Constitutional Law* 244 (2d ed. 1988) However, the words of the Constitution more particularly narrow the positions in the Federal government which are included within the constitutional appointment process.

Article II of the Constitution states:

> Section 1. The executive Power shall be vested in a President of the United States of America. . . .
>
> Section 2. The President shall be Commander in Chief of the Army and Navy of the United States. . . .
>
> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and *he shall nominate, and by and with the Advice and Con-*

> *sent of the Senate, shall appoint* Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, *and all other Officers of the United States,* whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment *of such inferior Officers,* as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.
>
> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.
>
> Section 3. He shall . . . take Care that the Laws be faithfully executed, and *shall Commission all the Officers of the United States.*

(Emphasis added.)

In light of these provisions, the first question which arises is who are "all other Officers of the United States" or "such inferior Officers, as they think proper" within the meaning of Article II of the Constitution. The Supreme Court in *United States v. Germaine,* 99 U.S. 508, 510, 25 L.Ed. 482 (1879), defined such officers as "all persons who can be said to *hold an office* under the government about to be established under the Constitution. . . ." (Emphasis added.) More recently, the Supreme Court spoke particularly on the office holders who could be considered "Officers of the United States," as follows:

> We think that the term "Officers of the United States" as used in Art. II, defined to include "all persons who can be said to hold an office under the government" in *United States v. Germaine, supra,* is a term intended to have substantive meaning. *We think its fair import is that any appointee exercising significant authority pursuant to the laws of the*

> *United States is an "Officer of the United States," and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article.*

Buckley v. Valeo, 424 U.S. at 125-26, 96 S.Ct. at 685 (emphasis added). *See Freytag v. C.I.R.*, 501 U.S. at ——, 111 S.Ct. at 2640. In this light, a critical question in this case is whether a military judge is an Officer of the United States.

I note that this Court most recently in *United States v. Graf*, 35 MJ 450, 465 (CMA 1992), and *United States v. Mabe*, 33 MJ 200 (CMA 1991), analyzed the statutes and regulations concerning the military judge and concluded that "the Uniform Code of Military Justice contemplates that a military judge be a real judge as commonly understood in the American legal tradition." 35 MJ at 465. In addition, I note that in *Freytag v. C.I.R.*, *supra*, the Supreme Court expressly held that a special trial judge established by Congress "as an aide to [a] Tax Court judge" is "an 'inferior Officer' whose appointment must conform to the Appointments Clause." 501 U.S. at ——, 111 S.Ct. at 2640.

The Supreme Court in *Freytag* articulated its reasoning for reaching this conclusion, as follows:

> The Commissioner reasons that special trial judges may be deemed employees in subsection (b)(4) cases because they lack authority to enter a final decision. But this argument ignores the significance of the duties and discretion that special trial judges possess. The office of special trial judge is "established by Law," Art. II, § 2, cl. 2, and the duties, salary, and means of appointment for that office are specified by statute. *See Burnap v. United States*, 252 U.S. 512, 516-517, 40 S.Ct. 374, 376-377, 64 L.Ed. 692 (1920); *United States v. Germaine*, 99 U.S. 508, 511-512, 25 L.Ed. 482 (1879). These characteristics distinguish special trial judges from special masters,

who are hired by Article III courts on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute. *Furthermore, special trial judges perform more than ministerial tasks. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion.*

Even if the duties of special trial judges under subsection (b)(4) were not as significant as we and the two courts have found them to be, our conclusion would be unchanged. Under §§ 7443A(b)(1), (2), and (3), and (c), the chief judge may assign special trial judges to render the decisions of the Tax Court in declaratory judgment proceedings and limited-amount tax cases. The Commissioner concedes that in cases governed by subsections (b)(1), (2), and (3), special trial judges act as inferior officers who exercise independent authority.

501 U.S. at ——, 111 S.Ct. at 2640 (emphasis added).

The position of military judge is established by law. *See* Arts. 26 and 66, UCMJ, 10 USC §§ 826 and 866, respectively. The duties and functions of a person in this position are also established by statute. *See* Arts. 26, 39, 51, and 66, UCMJ, 10 USC §§ 826, 839, 851, and 866, respectively. The Code authorizes military judges to hear and determine motions on various pretrial, trial, and posttrial matters (*see* Art. 39(a)); rule on all questions of law and interlocutory questions at courts-martial (Art. 51(b)); and impose Federal convictions up to and including life in prison, punitive separations from the service, and substantial financial penalties (Arts. 16(1)(B) and 18, UCMJ, 10 USC §§ 816(1)(B) and 818, respectively). A judge sitting with court members also in-

structs them on the various matters necessary to reach appropriate findings and sentences, even in capital cases where a servicemember's life is at stake. (Art. 51(c)). These are not ministerial tasks but judicial ones calling for the exercise of significant discretion. *See United States v. Graf*, 35 MJ 450; *United States v. Cole*, 31 MJ 270, 272 (CMA 1990). Finally, judges exercise independent authority. Art. 37, UCMJ, 10 USC § 837. *See United States v. Graf, supra.* In my view, the military judges and appellate military judges are "Officers of the United States," as provided for in Article II, § 2 of the Constitution.

VI

The Constitutional Requirements for a Valid Appointment

My next inquiry concerns the particular requirements provided in the Constitution for a valid appointment of "Officers of the United States." The answer to this question in large part depends on whether a military judge is one of "all other Officers of the United States" or is one of the "inferior Officers" generally denominated in Article II, § 2. *See United States v. Germaine*, 99 U.S. 508, 509-10, 25 L.Ed. 482 (1879). *See generally* R. Rotunda, J. Nowak, and J. Young, *Treatise on Constitutional Law: Substance and Procedure* § 9.4 at 504-05 (1986). In light of the Supreme Court's characterization of a special tax court judge as an inferior officer in *Freytag v. C.I.R., supra*, I have no reservation in concluding that a military trial judge and military appellate judge are "inferior Officers" of the United States within the meaning of Article II, § 2. *See also Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612.

In this light a military judge need not be appointed by the President by and with the Advice and Consent of the Senate. However, it is required that he be appointed by "the President alone," a Court of Law, or a Head

of a Department. *Freytag v. C.I.R., supra.* Nevertheless, the lead opinion and the Navy-Marine Corps Court of Military Review in *United States v. Coffman*, 35 MJ 591 (1992), have held that this constitutional requirement is satisfied by a military officer's earlier commission and succeeding promotions by the President with the Advice and Consent of the Senate. Relying on *Shoemaker v. United States, supra*, they assert that no further appointment by the President, a Court of Law, or a Head of a Department is required to permit a "legally trained" military officer to constitutionally assume the office of military trial or appellate judge.[5]

The Navy-Marine Corps Court of Military Review articulated its rationale for its holding in *Coffman* as follows:

> Assuming *arguendo* that [the Appointments Clause] applies to military judges, the fact is that all military judges must be commissioned officers of the armed forces of the United States and, as such, have by law already been *appointed* by the President. Art. 26(b), UCMJ, 10 U.S.C. § 826(b); 10 U.S.C. §§ 101 (4), 101(15), 531, 593, 624, 5001(6), 5912. Depending upon grade, component, and presence on the active-duty list, some of these commissioned officers by law must also have had their appointments confirmed by and with the advice and consent of the Senate. 10 U.S.C. §§ 531, 593, 624, 5912. All military judges must be lawyers. Art. 26(b), UCMJ, 10 U.S.C. § 826(b). The duties these commissioned officers are *detailed* to perform as military judges are within the sphere of their official duties and are germane to the office they already hold. A second appointment from the President to a commissioned

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[5] This argument on its face fails to justify appointment of civilians to the Court of Military Review as authorized by Article 66, Uniform Code of Military Justice, 10 USC § 866.

> officer to perform the duties of a military judge is simply not required. *Cf. Shoemaker v. United States*, 147 U.S. 282, 299-301, 13 S.Ct. 361, 390-391, 37 L.Ed. 170, 185 (1892) (Army officers (engineers) were not required to obtain a second appointment to perform duties on a commission created by Congress to acquire lands for a park). Accordingly, we conclude the appellant's first assignment of error is also without merit.

35 MJ at 592.

The lead opinion more particularly posits two reasons why no further constitutional appointment of military judges is required by the Appointments Clause. First, it concludes that the office of military judge is not a "new office," so no additional appointment is required under *Shoemaker v. United States, supra.* Assuming it is a new office, the opinion holds that the germaneness of its duties to those duties previously performed by "legally trained military officers" also precludes the need for a second appointment under *Shoemaker.* I disagree.

The lead opinion concedes that a military judge is an Officer of the United States. Moreover, it notes that the new powers of this officer were previously shared by the members of a court-martial, its president, and its law officer. Thus, Congress did not increase the power and duties of "an existing office" but created a new office to which these powers were transferred. It is the removal of these powers and duties from commissioned military officers, not their addition thereto, which renders inapposite the lead opinion's no-"new-office" argument.

I also find that the lead opinion grossly misapprehends the nature of the duties of a military judge and his contribution to military justice. The creation of the military judge in 1969 was a watershed event because it introduced for the first time, statutorily, *a professional ju-*

diciary at courts-martial.[6] S.Rep. No. 1601, 90th Cong., 2d Sess. 3, 14 (1968). *See* Ervin, *The Military Justice Act of 1968*, 45 Mil.L.Rev. 77, 83, 88-91 (1969). *See*

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[6] The establishment of the military judge was not the only change accomplished by the legislation of 1968. Also, for the first time in the history of American military justice, a service-member could be tried and sentenced by a single military officer without court members in serious non-capital cases. Art. 16(1)(B), UCMJ, 10 USC § 816(1)(B). *See* H. Moyer, *Justice and The Military* § 2-620 at 536 (1972); Douglass, *The Judicialization of Military Courts*, 22 Hast. L.J. 213, 220 (1971).

Representative Philbin commented on the reason for this bill as follows:

> The need for this bill has become acute because of the increased size of our Armed Forces resulting from the military activity in Southeast Asia. Besides the savings in time and manpower afforded by the bill, the bill provides meaningful benefits and protections to the accused.
>
> The enactment of this legislation will permit the procedure for trials by special and general courts-martial to conform more closely with the procedure used in the trial of criminal cases in the U.S. district courts and will enhance the prestige and effectiveness of the law officer, whose name is changed by the bill to "military judge," so that his judicial stature and authority in the courtroom will more closely approximate that of a civilian trial judge. The bill allows the military judge to rule finally on certain procedural matters, such as motions for findings of not guilty, on which he now may be overruled by the court members who are untrained in the law. The bill provides for pretrial and posttrial sessions to be held by the military judge without the presence of the court panel for the purpose of deciding procedural questions. The bill provides for trial in special and general court-martial by a military judge alone without court members if the accused requests and the request is approved by the military judge. *These last two provisions are expected to save innumerable man-hours of line officers who would otherwise be required to be in attendance at courts-martial, as well as improving the internal efficiency of the justice system.*
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> * * * *

[Continued]

generally Ross, *The Military Justice Act of 1968: Historical Background*, 23 JAG.J. 125 (1969). In this context, a holding that this office is new is an understatement.

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[6] [Continued]

> *The enactment of this bill will be the most significant advance in the field of military justice since the enactment of the Uniform Code of Military Justice in 1951.*

114 Cong.Rec. 30563-64 (1968) (emphasis added).

Representative Bennett, a central figure in the development of this legislation, made this statement regarding the 1968 legislation:

> The need for this bill has become acute because of the increased size of our Armed Forces resulting from our present military activity in Vietnam. The bill provides meaningful benefits and protections to the accused, as well as streamlining procedures. The bill contains the following provisions, which are designed to increase the fairness of the military justice system: First, the accused must be afforded the right to be defended by a qualified lawyer at special courts-martial—heretofore such a right only existed in the case of general courts-martial; second, before a bad conduct discharge can be adjudged at a special court-martial, the accused must be represented by a qualified lawyer and the proceedings must be conducted by a "military judge"—a term I will discuss below—except where physical conditions or military exigencies prevent one from being obtained; third, the bill extends the time in which the accused can petition for a new trial from 1 to 2 years; and fourth, an accused faced with trial at summary court-martial can object to such an informal trial, at which time the convening authority must bring charges at a special or general court-martial or dismiss them.
>
> *The enactment of H.R. 15971 will permit the procedure for trials in the military to conform more closely to the procedures used in the Federal courts. The bill also enhances the prestige and effectiveness of the law officer, whose name is changed to "military judge." The role of the "military judge" will closely approximate that of a civilian trial judge:* he will rule finally on certain procedural matters and will hold open pretrial and posttrial sessions without the presence of the court for the purpose of deciding procedural questions. An accused can re-

Turning to the lead opinion's "germane duties" rationale, I also find its application in the present case unacceptable. *Shoemaker v. United States, supra,* is an exception to normal Appointments Clause practice, and a very narrow one at that. The lead opinion's extension of that case beyond its facts to permit the blanket investing of "legally trained" military officers with the office of military judge without compliance with the Appointments Clause is simply unprecedented. Strictly speaking, such an approach might be appropriate only if the "legally trained" military officers also held a specific presidentially appointed military justice office such as the Judge Advocate General of the Navy. *See* 10 USC § 5148.[7] Otherwise, the lead opinion's general-duties analysis, at least in my view, constitutes judicial activism.

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quest a special and general court-martial by a "military judge" alone.

The bill changes the name of the intermediate appellate agencies in the military from boards of review to courts of military review. The bill requires that the judges of these courts and of courts-martial be part of an independent judiciary. In addition, the bill authorizes a military form of release on bail pending appeal, the need for which has been pointed out in several recent cases.

The importance of this legislation cannot be overstated. It is particularly needed in Vietnam, as has been pointed out by General Westmoreland; for under the bill line officers will be free from the necessity of serving as court members in many cases; and many previously wasted man-hours will be saved because of streamlined procedures.

I think it is most significant that the House of Representatives, which fathered the Uniform Code of Military Justice, also initiated the action on this legislation and now has the opportunity to put the capstone on it. *The enactment of H.R. 15971 will be the most significant advance in the field of military justice since enactment of the Uniform Code of Military Justice. I heartily recommend the House approve the Senate amendments.*

114 Cong.Rec. 30565 (1968) (emphasis added).

[7] Neither of the two cases cited in *Shoemaker v. United States,* 147 U.S. 282, 301, 13 S.Ct. 361, 391, 37 L.Ed. 170 (1893), supports

In *Shoemaker*, the Supreme Court considered the devolution of additional duties not on commissioned military officers in general or on commisisoned military engineering officers. Instead, they devolved on military officers already holding a specific military or civilian office requiring a presidential appointment. *See* Thain, *Legislative History of General Staff of the Army of the United States* 3, 485 (1901). *See generally Hoeppel v. United States*, 85 F.2d 237, 241 (D.C.Cir.1936). One Rock Park Creek Commission member who was a military officer had been previously appointed by the President to the Office of the Chief of Engineers of the United States Army. *See* R.S. §§ 1094, 1151, and 1193 (1878), and 17 Op. Atty. Gen. 2, 3 (1881); *see generally* 1 Stat. 749 (1799) and 20 Stat. 151, § 13 (1878); *see also* 10 USC § 3036 (1956). The second, also a military officer, had previously been "detailed" by the President as the Engineer Commissioner for the District of Columbia. *See* Ch. 180 § 2, 20 Stat. 103 (1878); 26 Stat. 1113 (1890); *see also*

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a "commissioned officer" exception to the Appointments Clause or its general-military-duty rationale as created by the lead opinion.

The petitioner in *Smith v. Whitney*, 116 U.S. 167, 6 S.Ct. 570, 29 L.Ed. 601 (1886), was an officer of the Navy who was later *appointed by the President by and with the consent of the Senate*, as the "chief of the bureau of provisions and clothing and paymaster general in the department of the navy, with the relative rank of commodore." *Id.* at 168, 6 S.Ct. at 570.

The petitioner in *Wales v. Whitney*, 114 U.S. 564, 5 S.Ct. 1050, 29 L.Ed. 577 (1885), was an officer in the Navy who *was later appointed by the President, by and with the consent of the Senate* as "chief of the bureau of medicine and surgery in the department of the navy," which office carried the additional title of "surgeon general of the navy." *Id.* at 569, 5 S.Ct. at 1052. *See* 10 USC § 5137, Historical and Revision Notes, R.S. 421 and 426.

The Supreme Court's holding that these military officers could be court-martialed for offenses under the Articles for the Government of the Navy does not logically suggest that an additional presidential appointment was not required for their assumption of their more particular civil or military offices.

10 USC § 3534 (1956). Thus, the additional "germane" duty of membership on the Rock Creek Park Commission cannot be simply said to have generally devolved on a diffused pool of commissioned officers or commissioned officers with engineering training.

Second, the *Shoemaker* decision makes clear that this extraordinary application of the Appointments Clause rests on a conclusion that the new additional duties are "germane to the offices already held by them." 147 U.S. at 301, 13 SCt. at 391. More particlularly, the Supreme Court there said:

> It is true that it may be sometimes difficult to say whether a given duty, devolved by statute *upon a named officer*, has regard to the civil or military service of the United States. *Wales v. Whitney*, 114 U.S. 564, 569, 5 S.Ct. 1050 [1052]; *Smith v. Whitney*, 116 U.S. 167, 179, 181, 6 S.Ct. 570 [576, 577]. But, in the present case, the duty which the military officers in question were called upon to perform cannot fairly be said to have been dissimilar to, or outside of the sphere of, their official duties.

147 U.S. at 301, 13 S.Ct. at 391 (emphasis added). The additional duties as a member of the Rock Creek Park Commission were particularly related to the military officers' office as Chief of Engineers of the United States Army and office as Engineer Commissioner for the District of Columbia. Clearly neither duty as engineer nor training as an engineer sufficed.

Appellate government counsel and various amici have also asserted that the duties of a military judge are "germane" to the various powers of a commissioned officer under the Uniform Code of Military Justice. These include the power to "quell quarrels, frays, and disorders" (Art. 7(c), UCMJ, 10 USC § 807(c)); make arrests (Art. 9(b), UCMJ, 10 USC § 809(b)); serve as an investigating officer (Art. 32, UCMJ, 10 USC § 832);

impose non-judicial punishments (Art. 15, UCMJ, 10 USC § 815); and serve as court-martial members at special courts-martial without a military judge (Art. 25(a), UCMJ, 10 USC § 825(a)). I do not consider a military judge's judicial duties similar to or within the sphere of the general military justice responsibilities of a line officer. Moreover, the latter duties are collateral and irregular and, therefore, also lack the specificity-of-office considered in *Shoemaker*.

Finally, the available lower court decisions applying *Shoemaker* simply do not support a broad military commission-promotion exception to the Appointments Clause for legally trained officers. The Court of Appeals for the Eleventh Circuit applied *Shoemaker* in the context of the "Investigating Committee of the Judicial Council of Eleventh Circuit." *See In the Matter of Certain Complaints Under Investigation*, 783 F.2d 1488 (11th Cir. 1986). It noted that the members of this committee were *sitting federal judges* already appointed by the President who were later selected for service *on this judicial committee* by the Chief Judge of the Circuit. It held:

> Their selection for service on the Committee does not gain them new positions in any meaningful sense: *to the contrary, service on a committee of the judicial council, when called upon, is merely an outgrowth of their existing responsibilities. See Shoemaker v. United States*, 147 U.S. 282, 301, 13 S.Ct. 361, 391, 37 L.Ed. 170 (1893) (*a statutory expansion of the functions of an existing position does not create a new office requiring re-appointment, at least where the newly-added duties are "germane" to existing functions*). *See also* 28 U.S.C. §§ 291, 292 (the Chief Justice may designate and temporarily assign any circuit judge to act as a circuit judge in another circuit if necessary; chief judges of circuit courts may make similar designations and temporary as-

signments with respect to district judges and districts within their circuits); *id.* §§ 293-96.

783 F.2d at 1515 (emphasis added). A previously appointed judge is not the same as a previously commissioned officer who is simply "legally trained."

Judge Lamberth of the United States District Court for the District of Columbia also impliedly rejected the "legally trained" military-officer interpretation of *Shoemaker*. He said:

> The [Supreme] Court rejected this argument [that a commission member could not serve absent Senate approval], holding that:
>
> > As, however, the two persons whose eligibility is questioned were at the time of the passage of the act and of their action under it officers of the United States who had been theretofore appointed by the President and confirmed by the Senate, we do not think that, because additional duties, germane to the offices already held by them, were devolved upon them by the act, it was necessary that they should be again appointed by the President and confirmed by the Senate. It cannot be doubted, and it has frequently been the case, that *Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.*
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> *Id.* at 301, 13 S.Ct. at 391 (emphasis added).

The *Shoemaker* case is distinguishable from this case in two important respects. *First, the provision challenged in Shoemaker added certain duties to two offices; it did not confer additional responsibilities on any particular officer. Had the Chief of Engineers of the United States Army or the Engineer Commissioner of the District of Columbia resigned from*

> *office after the commission was established, he would no longer have served on the commission*—the new Chief of Engineers or Engineer Commissioner would have taken over those duties. Here, however, Mr. Wall was designated the new Director of OTS. Although the position was given to him by virtue of his prior position, it was given to him.

Olympic Federal S & L Assn. v. Director, Office of Thrift Supervision, 732 F.Supp. 1183, 1192-93 (D.D.C.1990) (some emphasis added). Again, no mention whatsoever was made concerning their remaining status as military officer or their general training as engineers.

Lastly, *Gila River Pima-Maricopa Indian Community v. United States*, 8 Cl.Ct. 700 (1985), provides an example of Congress' recognition and treatment of the *Shoemaker* problem. That decision notes that Congress, in constituting the United States Claims Court in 1982 by using trial judges from the old Court of Claims, expressly confronted a *Shoemaker* problem. Judge Merow provided the following footnote in his opinion:

> Thus, in discussing the constitutionality of the provision of Pub.L. No. 97-164 reconstituting the trial division of the Court of Claims into a United States Claims Court comprised of the trial judges of the Court of Claims, H.R.Rep. No. 96-1300, 96th Cong., 2d Sess. 23, n.25, states as follows:
>
> "Article III, section 1, of the Constitution explicitly empowers the Congress to ordain and establish inferior courts. Consequently, the only questions concern the relation between the power of Congress, under Article I, section 8, cl. 18, of the Constitution to alter, enlarge, or restrict the functions of existing federal officers and the requirement of the Appointments Clause, Article II, section 2, cl. 2, that appointments as officers of the United States be made in the manner prescribed by that clause. Stated differently,

this involves a reconciliation of the Supreme Court's decisions in *Shoemaker v. United States*, 147 U.S. 282, 301, 13 S.Ct. 361, 391, 37 L.Ed. 170 (1893), and *Buckley v. Valeo*, 424 U.S. 1, 118-36, 96 S.Ct. 612, 681-90, 46 L.Ed.2d 659 (1976). The earlier case stated the principle that Congress may, by statute, confer new duties on officers of the United States, at least where the new duties are 'germane' to their existing functions, without the necessity of reappointment under the Appointments Clause. The lat[t]er holds that Congress may not itself appoint officers of the United States.

"The Committee has concluded that the carry-over of the trial judges into the Claims Court is a modification of an existing position rather than a legislative appointment to a new one, governed by *Buckley*. The bill merely would confer 'germane' new duties and extend the tenure of the existing trial judges as permitted by *Shoemaker*, rather than create a new office."

8 Cl.Ct. at 702. Examination of the legislative history of Article 26 especially since 1968 reveals no similar statements by Congress concerning *Shoemaker*'s applicability to "legal trained" or untrained commissioned officers and the newly created position of military judge.

VII

Application to the Present Case

Finding the *Shoemaker* decision inapplicable, my final concern is whether the system of appointment of a military judge provided in the Uniform Code of Military Justice nonetheless meets the standards of Article II, § 2 of the Constitution. I have noted earlier that military judges are not technically "appointed" under the Code, and their being invested with office is a more complicated process than represented in the granted issue. In addi-

tion, I note that Major Pesik, the military judge who presided at appellant's court-martial, was a Marine, and the appellate court panel for this case was composed of both Navy and Marine officers.

Turning first to Major Pesik, he was commissioned an officer in the United States Marine Corps by appointment of the President, by and with the Advice and Consent of the Senate. 10 USC § 531(a); *see* 10 USC § 532 or § 593. In accordance with the normal course of events, he rose to the grade of major in the Marine Corps, some of his promotions requiring appointment by the President alone and some also requiring the Advice and Consent of the Senate. 10 USC § 624(c). At some point, with the approval of the Secretary of the Navy, he was designated "a judge advocate." 10 USC § 5587a. His assignment for duty as a judge advocate of the Marine Corps was made by direction of the Commandant of the Marine Corps. Art. 6(a). Moreover, he was certified by the Judge Advocate General of the Navy to perform the duties of trial and defense counsel detailed for a general court-martial. Art. 27(b). Later, he was certified as qualified to be a military judge and designated for detail as such by the Judge Advocate General of the Navy. Art. 26(b). Finally, he was assigned to duty at the Sierra Judicial Circuit by the Commandant of the Marine Corps on the recommendation of the Judge Advocate General of the Navy.

The Marine Colonel and Navy Captains on the Court of Military Review were also commissioned officers who were appointed by the President with the Advice and Consent of the Senate. Their promotions to these distinguished grades were accomplished by appointment of the President with the Advice and Consent of the Senate. They were constituted a court by the Judge Advocate General of the Navy and designated for detail to it by that same officer.

The bottom line is that none of these military judges was appointed to that position or a germane position by the President alone, the Courts of Law, or the Head of a Department.[8]

VIII

CONCLUSION

Duty to Inform

In summary, it is my view that a military judge is not only a military officer but an "inferior Officer" of the United States as provided for in Article II, § 2 of the Constitution. Congress under Article I, § 8 of the Constitution was fully competent to create such a military judicial position and empower the holder of this office to dispense justice to servicemembers at courts-martial. Having done so, however, it was further required by Article II, § 2 to provide that the person who fills this office be appointed by the President, a Court of Law, or the Head of a Department.

The reason that Congress has not provided for this type of appointment for military judges is not readily apparent. The lead opinion suggests that Congress, cognizant of the decision in *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170 made a conscious decision that a second appointment by the President of a commissioned officer to perform these new court-martial duties was not necessary. Examination of the legisla-

[8] The term "Heads of Departments" for purposes of the Appointments Clause has recently been defined by the Supreme Court to be a member of the Cabinet. *See Freytag v. Commissioner of Internal Revenue*, 501 U.S. ——, ——-——, 111 S.Ct. 2631, 2642-43, 115 L.Ed.2d 764 (1991). "Courts of Law" are also defined in terms of their "exclusively judicial role." *Id.* at ——, 111 S.Ct. at 2645. Neither the Secretary of the Navy, the Commandant of the Marine Corps, nor the Judge Advocate General of the Navy meets either of these tests.

tive history of the statutes creating this position, however, offers no express support for this theory. *Cf. Gila River Pima-Maricopa Indian Community v. United States*, 8 Cl.Ct. at 702 n. 1. Moreover, examination of the *Shoemaker* decision in light of the legislation creating the military judge suggests to me that this decision's rationale is inapplicable to the case at bar. *See Olympic Fed. S & L v. Office of Thrift Supervision*, 732 F.Supp. at 1192-93.

My own view is more consistent with congressional silence. The office of military judge was established in 1968 when the Supreme Court utilized a "mode of appointment" approach to the Appointments Clause. *See* Note, *Toward a New Functional Methodology in Appointments Clause Analysis*, 60 G.W.L.Rev. 536, 539-43 (1992); *cf.* Note, *Power of Appointment to Public Office Under The Federal Constitution*, 42 Harv.L.Rev. 426 (1929). In other words, an "inferior Officer" of the United States was a Federal office holder whose appointment Congress required be made by the President, a Court of Law, or the Head of a Department. *United States v. Mouat*, 124 U.S. 303, 8 S.Ct. 505, 31 L.Ed. 463 (1888). *See Hoeppel v. United States*, 85 F.2d 237, 241 (D.C.Cir.1936). It was not until 1976 in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, that the "mode of appointment" approach was jettisoned in favor of a functional duty approach to Appointments Clause questions. *See* Note, 42 Harv.L.Rev. at 544-52; *see also Freytag v. C.I.R.*, 501 U.S. ——, 111 S.Ct. 2631. In my view, there is simply no doubt that a military judge's duties and responsibilities now qualify him as an "inferior Officer" of the United States.[9]

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[9] The Supreme Court has recently denied petitions for certiorari in two cases where this Appointments Clause issue was raised for the first time in that Court. *Bolado v. United States*, —— U.S. ——, 113 S.Ct. 321, 121 L.Ed.2d 242 (1992); *Allen v. United States*, —— U.S. ——, 113 S.Ct. 324, 121 L.Ed.2d 244 (1992). How-

The Remedy

Appellant has shown no specific prejudice to his case due to the failure to provide for compliance with the Appointments Clause. However, simple affirmance is not sufficient under the *de facto*-appointee rationale of *Buckley* and the *Northern Pipeline* cases. It is the duty of this Court also to point out the unconstitutional statutory deficiency as this opinion has done. It should be in Congress' hands to render appropriate legislation to fix this statutory deficiency. In the interim, the President could, based on the rationale in this opinion, direct the Head of the Department of Defense to start appointing military judges as necessary to perform military justice functions in the department. *See United States v. Matthews*, 16 MJ 354, 382 (CMA 1983). Thus, the Executive Branch's constitutional role in this area, as envisioned by the Appointments Clause, would be restored.

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ever, as the Supreme Court itself has consistently said, "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490, 43 S.Ct. 181, 182, 67 L.Ed. 361 (1923). *See generally* R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* 269-72 (6th ed. 1986).

WISS, Judge (dissenting):

Not since *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987),[1] has an appeal presented questions of such fundamental importance to the institutional integrity and viability of the military justice system as does this one. Once the legal chaff is separated out, the grain of the related questions of law before this Court is quite clear:

First, in exercising its power "[t]o make Rules for the Government and Regulation of the land and naval Forces" under Article I, § 8, clause 14 of the Constitution, is Congress exempt from the prescriptions of Article II, § 2, clause 2 of the Constitution—the Appointments Clause—regarding appointment of "Officers of the United States"?

Second, within the meaning of the Appointments Clause and the decision in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. ——, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991), do Articles 26 and 66 of the Uniform Code of Military Justice, 10 USC §§ 26 and 66, respectively, establish a distinct office of military judge?

Third, if so, does the decision in *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed.2d 170

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[1] That is the only case in which the Supreme Court of the United States has granted plenary review of a decision of this Court, *see* Art. 67a, Uniform Code of Military Justice, 10 USC § 867a (1989); *see also* Art. 67(h)(1), UCMJ, 10 USC § 867(h)(1) (1983). There, the Court held that jurisdiction of a court-martial depended solely on the accused's status as a member of the armed forces, not on the "service connection" of the offenses charged. In doing so, the Court expressly overruled its decision in *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969), that had rested significantly on the historical viewpoint that "[b]oth in England prior to the American Revolution and in our own national history military trial of soldiers committing civilian offenses has been viewed with suspicion." *O'Callahan v. Parker*, *supra* at 268, 89 S.Ct. at 1688 (footnote omitted), quoted in *Solorio v. United States*, 483 U.S. 435, 442, 107 S.Ct. 2924, 2928, 97 L.Ed.2d 364 (1987).

(1893), permit the conclusion that the duties of that distinct office are "germane" to the duties either of military officers generally or "legally trained military officers" specifically, so that the Appointments Clause does not require separate appointment of some such military officers as military judges?

Today, a majority of this Court approves the present practice of appointment of military judges by officials[2] below the rank of those set out in Article II, § 2, clause 2 of the Constitution—the Appointments Clause. In doing so, however, I believe that the various opinions of my colleagues who join in that disposition improperly reconcile the two provisions of the Constitution that are in issue in the first question and incorrectly read the decisions of the Supreme Court of the United States on which answers to the second and third questions depend. Accordingly, I dissent.

I

Without question, the Constitution vested in Congress the powers to "raise and support Armies" (cl. 12); "provide and maintain a Navy" (cl. 13); and "make Rules for the Government and Regulation of the land and naval Forces" (cl. 14). Art. I, § 8. The critical question at the outset here is not Congress' authority to legislate in this area by constructing a military justice system and providing for trial and appellate military judges; rather, it is whether, in doing so, Congress is free from the facially unconditioned restriction of the Appointments Clause regarding how those military judges must be appointed.

The Chief Judge, particularly in Part IV of his opinion, thoughtfully treats the matter of deference to Con-

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[2] One important dimension to the problem underlying this appeal is that it is not entirely clear *who* "appoints" military judges. As the separate opinion of Chief Judge Sullivan makes apparent, the answer is not the obvious first guess (the Judge Advocate General of each service) and is not consistent among the armed forces.

gress in its regulation of military affairs. *See United States v. Prive*, 35 MJ 569, 573-77 (CGCMR 1992). The Supreme Court has instructed that "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Rostker v. Goldberg*, 453 U.S. 57, 70, 101 S.Ct. 2646, 2655, 69 L.Ed.2d 478 (1981), quoted in *Solorio v. United States*, *supra*, 483 U.S. at 447, 107 S.Ct. at 2931. *See also Goldman v. Weinberger*, 475 U.S. 503, 508, 106 S.Ct. 1310, 1313, 89 L.Ed.2d 478 (1986).

Deference, however, does not equate to abdication. The Supreme Court has recognized that, in light of Congress' regulatory powers over the military, constitutional rights might have application and meaning in the military different from the civilian community, *see, e.g.*, *Solorio v. United States*, *supra* 483 U.S. at 447, 107 S.Ct. at 2931. The Court, however, has never instructed that Congress' regulatory power is a talisman, in the face of which the remainder of the Constitution withers. Indeed, quite to the contrary, the Court stated in *Rostker v. Goldberg*, *supra*, 453 U.S. at 67, 101 S.Ct. at 2653:

> None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause, but the tests and limitations to be applied may differ because of the military context. We of course do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice.

(Citations omitted.)

The Constitution's grant of regulatory power to Congress over military affairs is no more plenary than, for instance, its grant of power to Congress in Article I

"[t]o . . . provide for the . . . general Welfare of the United States" (§ 8, cl.1); or over Federal elections (§ 4); or "[t]o make all Laws which shall be necessary and proper for carrying into Execution" these and other powers specifically set out elsewhere in the Constitution (§ 8, cl. 18). When the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), was presented with the argument that appointment of members of the Federal Election Commission was pursuant to these plenary powers of Congress and, thus, not subject to the Appointments Clause, the Court responded:

> But Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 [4 L.Ed. 579] (1819), so long as the exercise of that authority does not offend some other constitutional restriction. We see no reason to believe that the authority of Congress over federal election practices is of such a wholly different nature from the other grants of authority to Congress that it may be employed in such a manner as to offend well-established constitutional restrictions stemming from the separation of powers.
>
> The position that because Congress has been given explicit and plenary authority to regulate a field of activity, it must therefore have the power to appoint those who are to administer the regulatory statute is both novel and contrary to the language of the Appointments Clause. Unless their selection is elsewhere provided for, *all* officers of the United States are to be appointed in accordance with the Clause. . . . No class or type of officer is excluded because of its special functions.

Id. 424 U.S. at 132, 96 S.Ct. at 688.

I agree. There is nothing anywhere in the Constitution of the United States or in decisions of the Supreme Court that supports the notion that mandates of the Constitution do not penetrate the walls of the military enclave. Further, unlike application of certain individual rights to service-members, there is nothing about the Appointments Clause that requires a different application in a military context than it does in the rest of the United States.[3] Nothing could be plainer than that the Appointments Clause, by its own terms, does not except appointment to offices created under Congress' power to regulate the military any more than it excepts appointment to offices created under any of Congress' other numerous, plenary powers.

In short, as the Supreme Court succinctly stated in *Freytag v. C.I.R.*, 501 U.S. at ——, 111 S.Ct. at 2639, "Neither Congress nor the Executive can agree to waive this structural protection" of the Appointments Clause.[4]

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[3] Judge Crawford's attempt to distinguish between civilian and military judiciaries based on "military exigencies" is a strawman. Nothing in any of the other opinions in this case would have any untoward impact whatsoever on the ability of the Judge Advocate General to *tactically move and reassign* military judges or to meet the operational realities of a military in the field, as well as in the garrison. At the same time, there was no occasion of which this Court has been made aware that required any sort of *emergency appointment* of military judges resulting from deployment of our armed forces. Simply stated, Judge Crawford's implied alarm—that appointment of military judges by, say, the Secretary of Defense (*see* opinion, *infra*) somehow undermines the response capability of our armed forces in some manner that appointment by the Judge Advocate General does not—is a *false* alarm.

[4] Judge Crawford's constricted focus on the purpose of the Appointments Clause is a misstep off the cleared path of the law. As the Supreme Court of the United States unequivocally instructed in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. ——, ——, 111 S.Ct. 2631, 2639, 115 L.Ed.2d 764 (1991), the Appointments Clause not only involves the constitutional tug-of-war between the Executive and Legislative Branches but also ensures that

Accordingly, if the Uniform Code of Military Justice established a distinct office of military judge, appointments to fill that office must comport with the Appointments Clause.

II

In an effort to identify who are included as "Officers of the United States" and other "inferior Officers" within the meaning of the Appointments Clause, the Supreme Court has said:

> We think that the term "Officers of the United States" as used in Art. II, defined to include "all persons who can be said to hold an office under the government" in *United States v. Germaine* [, 99 U.S. 508, 510, 25 L.Ed. 482 (1879)], is a term intended to have substantive meaning. We think its fair import is that *any appointee exercising significant authority pursuant to the laws of the United States* is an "Officer of the United States," and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article.

Buckley v. Valeo, *supra*, 424 U.S. at 126, 96 S.Ct. at 685 (emphasis added), cited with approval in *Freytag v. C.I.R.*, *supra*, 501 US. at ——, 111 S.Ct. at 2640.[5]

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responsibility to make appointments to offices in the Executive Branch will not be delegated and diffused to a level below the very highest, responsive level of "the President alone," "Courts of Law," or "Heads of Departments."

[5] As the Chief Judge points out, *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), marked the first time that the Supreme Court used this approach of examining the functions and duties of a purported office to determine whether it was an Office of the United States. Prior to that decision, the approach was one that could fairly be characterized as rather circular: A position was an Office only if Congress required that the position be filled by the President, a Court of Law, or a Head of a Department. In other words, this "mode of appointment" approach essentially

Military judges are "established by Law," and their "duties and functions are . . . delineated in a statute"—specifically, Articles 26 and 66 of the Code. *See* 501 U.S. at ——, 111 S.Ct. at 2640. Further, their functions and responsibilities, as fully reflected in the Chief Judge's opinion, 36 MJ at 249-250, and prescribed in the statute and in the decisions of this Court, are leaps and bounds more than "ministerial tasks"; and "[i]n the course of carrying out these important functions, [military judges] exercise significant discretion." 501 U.S. at ——, 111 S.Ct. at 2640; *see* Criminal Law Note: *An Ongoing Trend: Expanding the Status and Power of the Military Judge*, The Army Lawyer 23 (Dept. of the Army Pamplet 27-50-239, October 1992). In my view, application of the Supreme Court's functional-duty analysis compels the conclusion that there is a distinct office of military judge.

The lead opinion concludes otherwise, after tracing the evolution of the law member to the law officer to the military judge. As to the final stage in this process, the plurality opines:

> The Military Justice Act of 1968 changed the title of the law officer to military judge, in order to increase his stature, and transferred more duties from the president of the court-martial to the military judge. *See* Art. 26, 82 Stat. 1336. *Since the Act merely transferred authority and duties from one official of the court-martial to another and renamed the law officer, it did not create a new office.*

36 MJ at 229-230 (emphasis added). This casual view of the functions and duties of military judges is not only demeaning; it is inaccurate.

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concluded that an Office was an Office when Congress *said* it was an Office by providing for appointment thereto consistent with the Appointments Clause. The functional-duty approach followed since *Buckley*, of course, is more consistent with the principle that even Congress cannot legislate in violation of the Appointments Clause, *see Freytag v. C.I.R., supra.*

First, the lead opinion itself acknowledges an *incredibly* important *addition* to the functions and discretion of the military judge over *any* other single official that previously sat at a court-martial: To sit, alone, as a court-martial and determine, alone, the issue of guilt and the sentence of a convicted accused in serious non-capital cases. This extraordinary power extends to convicting servicemembers of such serious felonies as murder and espionage and imposing any sentence other than death—including life imprisonment. Never before did any single member of the armed forces—the president of a court-martial or anyone else—have the statutory authority to perform this function.[6]

Second, the lead opinion omits to notice other important additions to the duties and responsibilities of a military judge that were not mere transfers from a president of a court-martial. For instance, prior to 1969, challenges for cause against a law officer or members of a court-martial were determined by the members collectively, *see* Arts. 41(a) and 51(b), UCMJ, 50 USC §§ 616(a) and 626(b) (1950), respectively, recodified as 10 USC §§ 841 (a) and 851(b) (1956), respectively; by contrast, after 1969, a military judge rules finally on all such challenges, *see* Art. 41(a) (1968). Additionally, as footnote 6 of the Chief Judge's opinion makes clear, Congress was aware of other important duties that were given to a military judge that, before, had not rested with any single official, *e.g.*, " ' to rule finally on certain procedural matters, such as motions for findings of not guilty, on which he now may be overruled by the court members who are untrained in the law,' " and " 'for pretrial and posttrial sessions to

[6] The plurality's effort to minimize the remarkable nature of this change, by referring to the long history of "one-member" *summary* courts-martial, is off the mark. After all, the Supreme Court has held that a summary court-martial is *not even a criminal proceeding*. *Middendorf v. Henry*, 425 U.S. 25, 36-42, 96 S.Ct. 1281, 1288-91, 47 L.Ed.2d 556 (1976).

be held by the military judge without the presence of the court panel for the purpose of deciding procedural questions.'" In sum, the role of the military judge "'will more closely approximate that of a civilian trial judge.'" *See* 114 Cong. Rec. 30564 (1968).

That is an *Office*.[7] *See Freytag v. C.I.R.*, 501 U.S. at ——, 111 S.Ct. at 2640. It is an Office that involves a full range and collection of judicial functions and duties that, prior to 1969, did not repose in any other individual in the military justice system.[8] This factual analogy is

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[7] In determining this question of whether there is a distinct office, the lead opinion reflects significance in subtleties of wording of Articles 26 and 66, and, by comparison, 67, UCMJ, 10 USC §§ 826, 866, and 867, respectively. I simply make these observations about that exercise.

The Supreme Court in *Freytag v. C.I.R.*, *supra*, 501 U.S. at ——, 111 S.Ct. at 2640, initially noted as a predicate that the office there was one "established by Law" and then followed the functional-duty approach and focused on the "duties and functions" delineated in the statute. As to whether Articles 26 and 66 as a predicate establish an office of military judge by law, a comparison of those provisions with the statutes in issue in *Freytag* ineluctably lead me to conclude that Articles 26 and 66 pass muster to do so. *Compare* 26 USC § 7443A-Special trial judges ("The chief judge [of the Tax Court] may, from time to time, appoint special trial judges who shall proceed under such rules and regulations as may be promulgated by the Tax Court." § 7443A(a)), *with* Article 1(10), UCMJ, 10 USC § 801(10) ("'[M]ilitary judge' means an official of a general or special court-martial detailed in accordance with section 826 of this title (article 26)."); Article 26(b) ("A military judge shall be detailed to each general court-martial."); and Article 66(a) ("Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges.")

That predicate established, however, the real heart of the test relates to the nature and quality of the functions and duties of military judges delineated by those provisions; that inquiry is more fully addressed in my opinion, *supra*.

[8] The lead opinion points out that some of the functions and responsibilities that, after 1969, rest with the military judge earlier

consistent with the plain language of the UCMJ, which expressly defines the military judge as "an official." Art. 1(10) (1969).

At the appellate level, the functions and duties of military judges are similarly imposing. A Court of Military Review exercises "awesome, plenary . . . powers." *United States v. Cole*, 31 MJ 270, 272 (CMA 1990). It is charged in every case it considers to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact," and it may in a given case "affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c).

In other words, appellate military judges sitting on a Court of Military Review in each case hear and decide all *legal* issues arising from the proceedings below, satisfy themselves that the evidence is *factually* sufficient to sustain the findings, assure that the sentence is *legally* imposable, and determine anew whether the sentence is an *appropriate* one. In addition to these functions during the usual course of appellate review of a court-martial conviction, Courts of Military Review possess and have exercised extraordinary-writ powers where appropriate. *See Dettinger v. United States*, 7 MJ 216 (CMA 1979). *All* this is done without any second-guessing by any mili-

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had been those collectively of the members of a court-martial. Without charting here the source of each of a military judge's duties, suffice to say that some earlier had belonged to members; some earlier had belonged to the president of a court-martial; and some earlier were non-existent—they were reposited for the first time in the office of military judge. Accordingly, I rhetorically ask the plurality: Does the fact that some (even assuming *most*, for this purpose) of the responsibility and discretion that now is lodged in *one* source actually came from *several* various sources in any way change the equation as to whether that *one* source now is an "office" under the functional-duty approach, *see* n.5, *supra*?

tary superior and is subject to review only within the judicial system, by this Court.

By any view, in my opinion, the functions of military judges at the appellate level, like those of military judges at the trial level, are substantially "more than ministerial tasks"; rather, they reflect the exercise of "significant discretion" as well as *final* judgment subject only to judicial review by a superior appellate court. *See Freytag v. C.I.R., supra*, 501 U.S. at ——, 111 S.Ct. at 2640. Just as surely as I said earlier about military judges at the trial level, these functions and duties of appellate military judges leave no doubt in my mind that Congress created an office of military judge.

III

Relying on *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170 (1893), the plurality concludes that

> [a]ssuming, *arguendo*, that a new office was created at some time during the evolution of the military judge, the result is the same, because the duties of the military judge are the same as those traditionally performed by military officers serving as members of courts-martial. As such, they are germane to the duties of a legally trained military officer detailed as a military judge.

Thus, the plurality reasons, a new appointment is not required. 36 MJ at 246. I join the Chief Judge's reasoning in Part VI of his opinion that rejects both this reasoning and its reliance on *Shoemaker*.

Simply stated, *Shoemaker* was a situation in which the Supreme Court looked at the duties of two *particular*, high-level military engineers—the Chief of Engineers and the Engineer Commissioner for the District of Columbia —and concluded that the *additional* duties that Congress

purported to give them as members of the Rock Creek Park Commission were germane to their particular offices, so that a second appointment was not necessary. That is a far cry from the extrapolation that the lead opinion now makes: That devolution of specific and highly responsible judicial duties as a military judge is "germane" to some nebulous notion of duties of "legally trained military officers" in general. *Cf.* Criminal Law Note, *supra*, 36 MJ at 242. Analogizing in reverse back to *Shoemaker*, what the plurality affirms here would be akin to concluding that the responsible and discretionary functions and duties of the commissioners on the Rock Creek Park Commission were "germane" to duties of *any* military officer trained as an engineer. *Shoemaker* may not be read that broadly.

Finally, I view two significant provisions in the Uniform Code of Military Justice as contradicting the plurality's conclusion that duties of a military judge are germane to the duties of a military officer. First, as Articles 26(b) and 66(a) expressly require that a military judge at both the trial and appellate levels be "a member of the bar of a Federal court or . . . of the highest court of a State," military authorities do not have complete control over whether a military officer meets the statutory qualifications to be a military judge. Admission to the practice of law is controlled or regulated by state statute, court rule, or both, and requires comprehensive legal training not provided by the military and a determination of legal competence by the civilian authority. *See* 7 Am Jur 2d, Attorneys At Law § 12; American Bar Association, Comprehensive Guide to Bar Admission Requirements (1992-93). Because a service-member's admission to the independent bar by civilian authority is a statutory qualification for a military judge, I cannot conclude that duties of a military judge are germane to the general duties of a military officer, even a "legally trained" one.

Second, as the lead opinion acknowledges, Article 66(a) authorizes appointment of *civilians* as appellate military judges on the Courts of Military Review. The plurality purports to preclude the difficulty that this statutory provision creates with its germaneness theory, but it cannot be evaded. Whether civilians sat as judges in this case is not the point; rather, the pertinent inquiry is: What impact does this statutory authorization have on the interpretation of that statute as a whole relevant to whether the duties and functions of an appellate military judge are "germane" to duties generally of a military officer, even one "legally trained"? The express statutory provision for civilians on the appellate court is inconsistent with the plurality's germaneness theory. The plurality disregards this inconsistency; I cannot do so.

CONCLUSION

In summary, I conclude that Congress is not exempt from the strictures of the Appointments Clause of Article II, § 2, clause 2 of the Constitution when it exercises its powers under Article I, § 8, clause 14 of the Constitution to regulate the land and naval forces. *See Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612. Considering the functions and duties of military judges, I conclude that Congress established a distinct office of military judge in Articles 26 and 66 of the Uniform Code of Military Justice, so the Appointments Clause must be complied with in filling that office. *See Freytag v. C.I.R.*, 501 U.S. ——, 111 S.Ct. 2631. Finally, I conclude that a prior general appointment as a military officer will not satisfy the Appointments Clause in this regard because the specific judicial duties required of the office of military judge—as opposed to duty as a military officer—are not "germane" to duties of a "legally trained" military officer in general. *See Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361.

Because a majority of this Court, on the other hand, is of the view that the present method of appointing military

judges meets constitutional requirements, I need not decide whether these appointments can be affirmed under the *de facto*-appointee rationale of *Buckley*, as discussed by the Chief Judge. 36 MJ at 256-257. I point out, though, that even that rationale has certain logical and legal limitations.[9]

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[9] The Chief Judge touches on some of these issues in Part VIII of his opinion in which he suggests the possibility of interim Presidential direction on appointments through the Secretary of Defense. In addition, the appropriate time for effecting statutory remedial action would be at issue. For instance, in implementing the *de facto*-appointee rationale in *Buckley v. Valeo, supra*, 424 U.S. at 142-43, 96 S.Ct. at 693, the Supreme Court stayed its judgment for a period of 30 days to afford Congress an opportunity to reconstitute the Federal Election Commission and, in the interim, allowed the commission to function *de facto*. Also, by analogy, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), which involved a jurisdictional void created by a ruling that a system of bankruptcy courts was unconstitutional, the Supreme Court delayed its mandate for several months to permit Congress an opportunity to implement remedial action. After the initial delay, 458 U.S. at 88, 102 S.Ct. at 2880, the Court granted a further delay of some 2½ months. 459 U.S. 813, 103 S.Ct. 199, 74 L.Ed.2d 160 (1982). *Cf. United States v. Matthews*, 16 MJ 354 (CMA 1983) (in decision finding court-martial death-penalty sentencing procedures unconstitutional, mandate withheld for 90 days to allow opportunity to change those procedures in time for appellant's resentencing).

APPENDIX B

IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

BEFORE

J. A. FREYER R. A. STRICKLAND JAMES E. ORR

UNITED STATES

v.

ERIC A. WEISS, 080 62 5296
Private (E-1), U. S. Marine Corps Reserve

NMCM 89 4189 Decided 31 January 1992

Sentence adjudged 19 September 1989. Military Judge: E. F. Pesik Jr. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Schools Battalion, Marine Corps Communication-Electronics School, MCAGCC, Twentynine Palms, CA 92278-5020.

LT ROBERT E. WALLACE, JAGC, USNR, Appellate Defense Counsel.

LT MARY ANNE RAZIM, JAGC, USNR, Appellate Defense Counsel.

LCDR LAWRENCE W. MUSCHAMP, JAGC, USN, Appellate Government Counsel.

APPENDIX C

U.S. COURT OF MILITARY APPEALS

No. 68,432
NMCM 91-2766

UNITED STATES, APPELLEE

v.

ADRIAN A. RICE, PRIVATE FIRST CLASS
U.S. MARINE CORPS, APPELLANT

Submitted Nov. 17, 1992
Decided Jan. 15, 1993

For Appellant: *Lieutenant James R. Crisfield, Jr.*, JAGC, USNR.

For Appellee: *Colonel T.G. Hess*, USMC and *Captain Laurie S. Powell*, USMC.

PER CURIAM:

This case is one of more than 200 cases now pending before this Court wherein an appellant has challenged the trial and appellate military judges who took action in his case because they were not appointed in accordance with the United States Constitution, Art. II, § 2, cl. 2, and the decision of the United States Supreme Court in *Freytag v. Commissioner of Internal Revenue*, __ U.S. __, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991). This Court has resolved this

same issue in the Government's favor in *United States v. Weiss*, 36 MJ 224 (CMA 1992). The mandate in that case was issued on January 6, 1993. In accordance with this Court's practice and in the interest of judicial economy, we will deny all petitions for review based solely on this issue when the petition supplement has been filed after the date of the mandate.

We further note the prevalence of the issue in previously granted cases and the possibility for further review by the United States Supreme Court. If certiorari is granted by the Supreme Court and some relief is afforded in those cases, this Court will accept out-of-time requests for appropriate relief in cases where the above denial orders have been issued.

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

APPENDIX D

U.S. COURT OF MILITARY APPEALS

No. 67,811
CMR No. 28653

UNITED STATES, APPELLEE

v.

ROBERTO TORO, JR., SERGEANT
U.S. AIR FORCE, APPELLANT

Argued April 6, 1993
Decided Aug. 3, 1993

Accused was convicted by general court-martial, Clifton D. Daniel, J., of three specifications of using methamphetamines, one specification of introducing methamphetamines onto military facility, and two specifications of distributing methamphetamines. The United States Air Force Court of Military Review affirmed, 34 M.J. 506. Review was granted. The United States Court of Military Appeals, Crawford, J., held that: (1) admission of prior consistent statements of prosecution witnesses was not plain error; (2) special agent's testimony that informants were among "very best sources" he had worked with was not plain error; and (3) prosecutor's sentencing argument that accused never acknowledged finding of guilty was not plain error.

Affirmed.

Wiss, J., filed separate opinion concurring in part and concurring in result.

Sullivan, C.J., filed separate opinion concurring in result.

For Appellant: *Eugene R. Fidell* (argued); *Paul M. Tendler, Colonel Terry J. Woodhouse, Captain Gilbert J. Andia, Jr.* (on brief); *Colonel Jeffrey R. Owens, Major Alice M. Kottmyer, Captain Richard W. Aldrich.*

For Appellee: *Captain Jane M.E. Peterson* (argued); *Colonel Richard L. Purdon* and *Lieutenant Colonel Jeffery T. Infelise* (on brief); *Lieutenant Colonel Brenda J. Hollis.*

Opinion of the Court

CRAWFORD, Judge.

Appellant was convicted by court members, contrary to his pleas, of three specifications of using methamphetamines, one specification of introducing methamphetamines onto a military facility, and two specifications of distributing methamphetamines, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. He was sentenced to a dishonorable discharge, confinement for 7 years, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved the adjudged sentence. The Court of Military Review affirmed the findings and sentence. 34 MJ 506 (1991). We are granted review of three issues, which are listed below in the order they are treated in this opinion:

I

WHETHER IT WAS ERROR TO ADMIT PROSECUTION EXHIBITS 8-12, 14-16, AND 18-28, THE PRIOR STATEMENTS OF PROSECUTION WITNESSES.

II

WHETHER APPELLANT WAS UNFAIRLY PREJUDICED BY "HUMAN LIE-DETECTOR" TESTIMONY OF AN OSI SPECIAL AGENT.

II

WHETHER TRIAL COUNSEL'S ARGUMENT ON SENTENCE WAS UNFAIR BECAUSE IT IMPROPERLY PENALIZED APPELLANT FOR NOT ADMITTING HIS GUILT.[1]

We hold that appellant waived any potential error by not objecting at trial and that there is an absence of plain error. *See generally United States v. Olano*, __ U.S. __, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *United States v. Fisher*, 21 MJ 327 (CMA 1986).

DISCUSSION

As the opening statements indicated, this case centered on the credibility of five informants who testified for the Government at trial. There are three evidentiary stages which concern the credibility of witnesses at trial: bolstering, impeachment, and rehabilitation.

Bolstering occurs before impeachment, that is, when the proponent seeks to enhance the credibility of the witness before the witness is attacked. *Laughlin v. United States*, 385 F.2d 287 (D.C.Cir.1967), *cert. denied*, 390 U.S. 1003, 88 S.Ct. 1245, 20 L.Ed.2d 103 (1968); *United States v. Dunlap*, 25 MJ 89 (CMA 1987).

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[1] We also granted review on issues regarding appointment of trial and appellate judges in violation of the Appointments Clause. Since the grant of review in this case we have held against appellant's position on both issues in *United States v. Weiss*, 36 MJ 224 (CMA 1992), *cert. granted*, __ U.S. __, 113 S.Ct. 2412, 124 L.Ed.2d 635 (1993).

Impeachment occurs after a witness testifies. The methods of impeachment include: character trait for untruthfulness – Mil.R.Evid 608(a), Manual for Courts-Martial, United States, 1984; prior convictions – Mil.R. Evid. 609(a); instances of misconduct not resulting in a conviction – Mil.R.Evid. 608(b); prior inconsistent statements – Mil.R.Evid. 613; prior inconsistent acts – *cf. Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); bias – *United States v. Abel*, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984), and Mil.R.Evid. 608(c); and specific contradiction.

Rehabilitation occurs after a witness' credibility has been attacked. Rehabilitation can take many forms, including explanations on redirect examination, corroboration, a character trait for truthfulness, or prior consistent statements – Mil.R.Evid. 801(d)(1)(B).

Issues I and II concern rehabilitation of the informants by prior consistent statements and by presenting evidence of a character trait for truthfulness, respectively. During redirect examination the Government sought to rehabilitate its witnesses by introducing their prior consistent statements. The Government also sought to introduce evidence as to their character traits for truthfulness.

I

Prior Consistent Statements

Prior to enactment of the Federal Rules of Evidence, which are the source of the Military Rules of Evidence, courts generally allowed consistent statements to be admitted for rehabilitative purposes only and not as substantive evidence. 4 J. Weinstein and M. Berger, *Weinstein's Evidence* ¶ 801(d)(1)(B)[01] at 801-187 (1992). Indeed, at common law, even consistent statements were not generally admitted unless the statements were made before the

existence of a motive to fabricate. *Id.* at 801-185 to 801-187. Enactment of the Federal Rules of Evidence did not change the common law rule concerning receipt of consistent statements. *Cf. United States v. Abel,* 469 U.S. at 49 and 51, 105 S.Ct. 467 and 468 (1984) (recognized bias as method of impeachment even though not in Fed.R. Evid.).

In *United States v. McCaskey,* 30 MJ 188, 192 (CMA 1990), this Court stated that "Mil.R.Evid. 801(d)(1)(B) generally was intended to be limited to prior consistent statements made before the alleged recent fabrication or improper influence or motive occurred." In applying this rule, the military judge must determine, with the aid of counsel, when the motive to fabricate occurred, *e.g.,* at trial or before trial; whether the statement sought to be admitted rebuts the recent fabrication, improper influence or motive; and whether the prior statement is relevant. *See United States v. Montague,* 958 F.2d 1094, 1098 (D.C.Cir. 1992).[2] Even if these prerequisites are satisfied, the judge should apply the balancing test under Mil.R.Evid. 403. *Id.*

Here the defense objected only to a redacted version of one statement going to the members instead of the complete statement. Had the defense objected to the statements in their entirety, the prosecution would have been asked to prove whether the motive to fabricate occurred at

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[2] There is a split in the circuits, *see United States v. Montague,* 958 F.2d 1094, 1099 (D.C.Cir.1992), and the differences in individual cases can be reconciled by collapsing the authorities

> into one principle that would be consistent with the goals of the Federal Rules of Evidence and common law precedents. Any statement, even one made after a motive to falsify has arisen, may be used under Rule 801(d)(1)(B) if it tends to disprove a suggestion that a witness is not telling the truth.

S. Saltzburg and M. Martin, 2 Federal Rules of Evidence Manual 144 (5th ed. 1990).

trial or at the time the witnesses were hopeful of seeking leniency from agents of the Air Force Office of Special Investigations (OSI).

It appears from the opening statements and throughout the record of trial that the defense strategy was to portray the undercover informants as untruthful witnesses who were skimming drugs from their buys and stealing some of the controlled money. Indeed, the defense was also interested in the members' receiving the pretrial statements because many of those statements were inconsistent with the witnesses' testimony. That defense strategy was to portray each of the five informants as anxious to please the OSI in return for leniency. The defense argued that the names they gave to the OSI were based upon the personnel roster, but were not sufficient alone to the investigators. The agents wanted more information including the proverbial who, what, when, where, why, and how. Each of the informants was strongly encouraged to cooperate and describe the alleged incidents more fully. The defense argued that the witnesses thought this cooperation meant pleasing the agents by fabricating what they saw. The defense further argued that this attitude to please resulted in innumerable inconsistencies in the informants' statements which are irreconcilable with their testimony given at trial. Thus the defense did not object when the Government introduced the prior consistent statements of the informants. This failure to object constitutes waiver of any error in the absence of plain error. *United States v. Olano*, __ U.S. __, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *United States v. Fisher*, 21 MJ 327 (CMA 1986).

In reviewing for plain error we can draw parallels between Fed.R.Crim.P. 52(b)[3] and similar provisions in the

[3] Fed.R.Crim.P. 52(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Uniform Code of Military Justice and the Military Rules of Evidence. Mil.R.Evid. 103(d) provides: "Nothing in this rule precludes taking notice of plain errors that materially prejudice substantial rights although they were not brought to the attention of the military judge." Article 59(a), UCMJ, 10 USC § 859(a), provides: "A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."

In analyzing Fed.R.Crim.P. 52(b) the Supreme Court in *United States v. Olano*, __ U.S. __, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), asserted a conviction should not be overturned unless three factors are satisfied: First, there must be an "error." *Id.* __ U.S. at __, 113 S.Ct. at 1777. Second, the error must "be 'plain.' 'Plain' is synonymous with 'clear' or, equivalently, 'obvious.' " *Id.* __ U.S. at __, 113 S.Ct. at 1777. And, third, the error must "affec[t] substantial rights." *Id.* __ U.S. at __-__, 113 S.Ct. at 1777-78.

Even when these factors are satisfied, Fed.R.Crim.P. 52(b) is "permissive, not mandatory. If the forfeited error is 'plain' and 'affec[ts] substantial rights,' the Court of Appeals has authority to order correct, but is not required to do so." *Id.* __ U.S. at __, 113 S.Ct. at 1778. The Court has previously "explained that the discretion" under Fed.R.Crim.P. 52(b) "should be employed 'in those circumstances in which a miscarriage of justice would otherwise result.' " *Id.* __ U.S. at __, 113 S.Ct. at 1779, quoting *United States v. Frady*, 456 U.S. 152, 163 n.14, 102 S.Ct. 1584, 1592 n.14, 71 L.Ed.2d 816 (1982). "The Court of Appeals should no doubt correct a plain forfeited error that causes the conviction or sentencing of an actually innocent defendant, but we have never held that a Rule 52(b) remedy is *only* warranted in cases of actual innocence." __ U.S. at __, 113 S.Ct. at 1779.

Assuming arguendo that the military judge erred by admitting the prior consistent statements of the informants, the error did not constitute plain error. Admission of the statements was clearly part of the defense strategy, and it did not affect a substantial right of appellant. The powerful nature of the evidence from the witnesses was demonstrated by the summary chart used before the members.[4] *See* Appendix. Thus we conclude that introduction of the government informants' prior consistent statements did not amount to plain error.

II

Character Evidence for Truthfulness

Issue II also revolves around the testimony of the five undercover sources. To rehabilitate their credibility on redirect examination, the Government called OSI Special Agent Wayne Keller. He testified, based on his contacts with five of the undercover sources, that he was of the opinion that they were reliable, credible and trustworthy. He also indicated that they were among the "very best sources" that he had worked with in over 10 years. The defense argues that this testimony is prohibited. *See, e.g., United States v. Harrison*, 31 MJ 330 (CMA 1990).

Mil.R.Evid. 608(a) provides that a witness may testify as to the reputation or opinion of an individual for truthfulness when the witness' character "for truthfulness has been attacked by opinion or reputation evidence or otherwise."

The defense argues that there are two limitations on Mil.R.Evid. 608(a). First, the character of the witness for

[4] The summary chart introduced at trial, which is attached as an appendix, showed appellant's involvement with key prosecution witnesses at various times and places.

truthfulness must have been "attacked by opinion or reputation evidence or otherwise." *Id.* Second, the evidence sought to be admitted is limited to character evidence for "truthfulness or untruthfulness." *Id.*

There is a third limitation. Opinion-or-reputation-type evidence may only be introduced when a proper foundation has been laid. The proponent must show that the character witness who will testify as to the witness' reputation resides or works in the same community as the witness and has lived or worked in the community long enough to have become familiar with the witness' reputation in the community. *Cf. Michelson v. United States,* 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948); *United States v. Tomchek,* 4 MJ 66, 77 (CMA 1977) (Cook, J., dissenting). The term "community in which he lives" is not subject to an exact geographical location, but means an area where a person is well known and has established the reputation. *See also United States v. Crawell,* 6 MJ 944 (ACMR), *pet. denied,* 7 MJ 249 (1979). To lay a proper foundation for opinion evidence, the proponent must show that the character witness personally knows the witness and is acquainted with the witness well enough to have had an opportunity to form an opinion of the witness' character for truthfulness. In *United States v. Perner,* 14 MJ 181, 184-85 (CMA 1982), this Court held that an enlisted psychiatric technician who "had seen" the accused's "wife professionally" on three occasions did not enjoy a sufficiently close relationship to express an opinion as to truthfulness.

The defense concedes, Final Brief at 16, that the first limitation has been satisfied, recognizing that this Court has indicated that when there is a "slashing cross-examination," the term "or otherwise" has been met. *United States v. Everage,* 19 MJ 189, 192 (CMA 1985). *Cf.* Uviller, *Credence, Character, and the Rules of Evidence: Seeing through the Liar's Tale,* 42 Duke L.J. 776, 795 n. 36 (1993)

("But rather than intensity, the key factor is the implication of bad character in the substance of the cross-examination."). Also, rehabilitation has been permitted when the cross-examination was done in such a manner as to induce the belief of untruthfulness. *United States v. Allard*, 19 MJ 346 (CMA 1985).

We need not decide whether there was a slashing cross-examination or an examination conducted to induce a belief of untruthfulness because the defense failed to object. The testimony that the informants were the "very best sources" appears to violate the rules because it does not involve traditional veracity evidence. Moreover, the prosecutor did not seek to lay a proper foundation for reputation or opinion evidence as to the witnesses' truthfulness. Had an objection been made to the lack of a proper foundation or to the testimony that they were the "very best sources" the judge could have taken curative measures. However, the defense did not object and thereby waived the error absent a finding of plain error. Mil.R.Evid. 103(d). Here the "best source" statement "did not affect a substantial right" of appellant. *United States v. Olano*, __ U.S. at __, 113 S.Ct. at 1777. The military judge instructed the members that it was for them "to determine the credibility of the witnesses; that is their worthiness of belief." This includes an examination of the witness' character for honesty. Appropriately, the instruction did not reference the "best source," because such testimony does not relate to a character trait for truthfulness and could not have affected a substantial right of appellant.

III

Sentencing Argument

During the prosecutor's sentencing argument, he rhetorically asked, Do you see "[a]nywhere [in appellant's

unsworn statement] that he acknowledges your finding of guilty? No." Despite the lack of any objection to this comment, appellate defense counsel now argues that this is an improper argument because it penalizes appellant for not admitting his guilt.

The military defendant has three options during sentencing. The defendant may testify under oath, make an unsworn statement, or not give any statement at all. RCM 1001(c)(2)(A), Manual, *supra*. The defendant also has the right to have live witnesses testify during pre-sentence procedures. RCM 1001(e).

After evidence is presented by the prosecution and the defense, both the prosecutor and the defense counsel have a chance to argue before the factfinder. RCM 1001(a)(1)(D) and (E). It is axiomatic that the prosecution may not comment on the defendant's right to remain silent—*Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); mischaracterize the evidence—*United States v. Carroll,* 678 F.2d 1208 (4th Cir.1982); or refer to the bias and prejudices of the court members—*see, e.g., United States v. Begley,* 38 CMR 488, 495 (ABR 1967). While the prosecutor "may strike hard blows, . . . they must be fair" blows. *United States v. Doctor,* 7 USCMA 126, 133, 21 CMR 252, 259 (1956). It is proper for the prosecutor to comment on appellant's refusal to admit guilt after the "accused has either testified or has made an unsworn statement and has either expressed no remorse or his expressions of remorse can be arguably construed as being shallow, artificial, or contrived." *United States v. Edwards,* 35 MJ 351, 355 (CMA 1992). In *Edwards* we did not find error based on a second comment by the prosecutor: "When you consider . . . his lack of remorse. . . ." As Judge Cox said, "It is the duty of this advocate [defense counsel] to ferret out improper argument, object thereto, and seek corrective action in the nature of instructions

for a mistrial if the argument is so outlandish that it is incapable of being cured." *Id.* at 354. During his unsworn statement, appellant expressed no remorse. When viewed in context and not in isolation, assuming any error, there was no plain error which precludes waiver from the failure to object. *See United States v. Causey*, 37 MJ 308 (CMA 1993).

The decision of the United States Air Force Court of Military Review is affirmed.

Judges COX and GIERKE concur.

WISS, Judge (concurring in part and in the result):

I concur in the majority opinion except for its reliance on the plain-error test announced by the Supreme Court of the United States in *United States v. Olano*, __ U.S. __, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). This Court's plain-error standard set out in *United States v. Fisher*, 21 MJ 327, 328 (CMA 1986), substantively parallels the *Olano* formulation except in one respect: Even if all three prongs of the standard are met, *Olano* does not require, but only permits, remedial action by the appellate court.

I know of no case in our precedent in which this Court has found that an error was obvious, substantial, and *hand an unfair prejudicial impact on the accused* and, yet, did not afford the accused a remedy. *See* Art. 59(a), Uniform Code of Military Justice, 10 USC § 859(a). Inasmuch as the question whether our steadfast precedent that is reflected in *Fisher* can (*see* Art. 59(a)) and should give way to the *Olano* articulation is not squarely presented and developed by the parties for decision, I decline to make that step. Applying the *Fisher* test, though, I agree with the majority's conclusion of no plain error in this case.

SULLIVAN, Chief Judge (concurring in the result):

Since I concur only in the result reached in the majority opinion, I must write separately to briefly address three issues. First, to the extent that Part I of the opinion suggests that prior consistent statements made after the alleged motive to fabricate are admissible under Mil.R.Evid. 801(d)(1)(B), Manual for Courts-Martial, United States, 1984, 37 MJ at 315-316 n.2, In interpret this to be inconsistent with current military law. *See United States v. McCaskey*, 30 MJ 188, 192-93 (CMA 1990). A prior consistent statement may be admitted under Mil.R.Evid. 801(d)(1)(B) only if made prior to when the alleged motive to fabricate arose. *Id.*

Second, the failure of defense counsel to object when the Government introduced the prior consistent statements of the informants constitutes "forfeiture" of the error, not "waiver," 37 MJ at 316. *See United States v. Olano*, __ U.S. __, __, 113 S.Ct. 1770, 1777, 123 L.Ed.2d 508 (1993) ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' "). I recognize that this Court has used waiver as synonymous with forfeiture. However, "the right at stake," *id.*, will determine whether the right can be forfeited merely by failure to assert that right or whether the known right can be waived only by the relinquishment or abandonment of the right. *Compare United States v. Fisher*, 21 MJ 327 (CMA 1986) (forfeiture of right to have military judge instruct members on the order of voting on proposed sentences), *with United States v. Davis*, 3 MJ 430, 433 (CMA 1977) (waiver of right to conflict-free counsel requires voluntary, intelligent, and knowing relinquishment). In the case *sub judice*, appellant forfeited his right to exclude the prior consistent statements of the government informants by not objecting.

Finally, in Part III of the majority opinion, Judge Crawford offers no conclusion as to whether trial counsel's comment during closing argument on sentencing was error. 37 MJ at 318-319. I would unequivocally conclude that trial counsel's comment on appellant's failure to acknowledge guilt in his sworn statement was not error. *United States v. Edwards*, 35 MJ 351, 355 (CMA 1992).

APPENDIX

SUMMARY CHART

ACCUSED	TIMES	LOCATION	DATES	DISTRIBUTOR	OTHERS PRESENT	APPLICABLE CHARGE AND SPECIFICATION
BARRILLEAUX AND	50 USES	KUNSAN TAEGU OSAN -Ms Lee's -Chun-11	Jan-Jun 87 Jan-Apr 88 Dec 88	ACCUSED MS LEE BARRILLEAUX	MS LEE LYONS BEASON ROSSI SEVERAL OTHERS	Use in Korea (Ch: Spec 1)
	1 USE Distrib Intro	YOKOTA -Franklin's Room	4-5 Jan	ACCUSED	FRANKLIN ARENDS	Use in Japan (Ch: Spec 2) Introduction to Yokota (Ch: Spec 4) Distribution in Japan (Add Ch: Spec 1)
LYONS	1 Use	OSAN -Chun-11 TAEGU -Ms. Lee's -Chun-11	Jan-Jun 87	ACCUSED	ONLY ACCUSED	Use in Korea (Ch: Spec 1)
BEASON	8-9 Uses	OSAN	Jan-Apr 88	MS LEE	MS LEE BARRILLEAUX	
	3 Uses	OSAN -Ms. Lee -Chun-11	Spring 87 Spring 88	MS LEE	MS LEE BARRILLEAUX LYONS	Use in Korea (Ch: Spec 1)
	1 Use 1 Distrib	TAEGU	Jan-Feb88	MS LEE ACCUSED	MS LEE ONLY ACCUSED	Distribution in Korea (Add Ch: Spec 2)
	1 USE	YOKOTA -Beason's Apartment	Oct/Nov88	BEASON	ONLY	Use in Japan (Ch: Spec 2)
	1 USE Intro	YOKOTA -Accused's Room	Oct/Nov88	ACCUSED	DIAMOND	Introduction to Yokota (Ch: Spec 4)
KINLEY	2 USES	OSAN -Ms. Lee's	JUL-Oct88	MS LEE	MS LEE FRANKLIN	Use in Korea (Ch: Spec 1)
	3 USES	OSAN -Ms. Lee's -Chun-11's	Sep 88	MS LEE FRANKLIN	MS LEE	Use in Korea (Ch: Spec 1)
FRANKLIN	1 USE	YOKOTA -Franklin's Room	4-5 Jan89	ACCUSED	BARRILLEAUX ARENDS	Use, Distrib in Japan (Ch: Spec 2, Add Ch: Spec 1) Intro to Yokota (Ch: Spec 4)
	2 USES	VILLA MODESTA CLARK -Chun-11	7-8 Jan89	ACCUSED ACCUSED	ARENDS ACCUSED	Use in the Philippines (Ch: Spec 3)

APPENDIX E

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM 28653
34 M.J. 506; 1991 CMR LEXIS 1603

UNITED STATES,

v.

SERGEANT ROBERTO TORO, JR.,
UNITED STATES AIR FORCE

December 19, 1991, Decided

PRIOR HISTORY:

Sentence adjudged March 13, 1990 by GCM convened at Yokota Air Base, Japan. Military Judge: Clifton D. Daniel. Approved sentence: Dishonorable discharge, confinement for 7 years, total forfeiture of all pay and allowances, and reduction to E-1.

DISPOSITION: AFFIRMED.

COUNSEL: Appellate Counsel for the Appellant: Captain Richard W. Aldrich (argued), Eugene R. Fidell, Esq. (argued), Paul M. Tendler, Esq. (argued), Colonel Jeffrey R. Owens, and Major Paul G. Morgan.

Appellate Counsel for the United States: Lieutenant Colonel Brenda J. Hollis (argued), Major Ann M. Mittermeyer (argued), Captain James C. Sinwell (argued), Major Paul H. Blackwell, Jr., and Major Jeffrey C. Lindquist.

JUDGE: Before O'BRIEN, O'HAIR, PRATT, and JAMES, Appellate Military Judges.

OPINION BY: JAMES

OPINION OF THE COURT

JAMES, Judge:

Convicted of divers drug offenses,[1] appellant assigns numerous errors that can be categorized as claims of error at trial, a complementary claim that the trial defense counsel's assistance was ineffective, a claim that the sentence is too severe, and a final claim relating to the lack of terms of tenure for the service of military judges and appellate military judges. We also address appellant's interlocutory motion for release from confinement pending appeal. We find no errors requiring relief, and we affirm the conviction and sentence.

Appellant assigned six errors relating to trial counsel's tactics at trial. However, some of his assignments are general statements that, like a Trojan horse, carry many issues. We address each aspect below.

I. Trial Counsel's Voir Dire

Appellant complains that trial counsel's examination of the court members was improper. See R.C.M. 912(d). Trial counsel's examination was extensive, and he did seek

[1] Appellant was convicted of the following violations of Article 112a, UCMJ, 10 U.S.C. § 912a (1988): Divers uses of methamphetamine in Korea in 1987 and 1988; divers uses of methamphetamine in Japan in 1988 and 1989; divers uses of methamphetamine in the Philippines in 1989; introduction of methamphetamine onto Yokota Air Base in Japan; distribution of methamphetamine in Japan in 1989; and distribution of methamphetamine in Korea in 1988.

to introduce his case to the members through it. Little of it was about the members and their qualifications. Instead, trial counsel covered the mechanics of drug abuse, its frequently social but covert nature, the lengthy history of drug abuse by his witnesses and their other misconduct, much of it reflecting ill on their trustworthiness. He converted his inquiries to permissible voir dire in most cases by asking, after too much discourse, whether the members could or would consider in deliberations the information he summarized.

Though we recognize that to be a widely popular tactic, we disapprove of it. It invites needless and endless controversy, and it risks confusion that counsel's summarization may be recalled as if it were evidence. Such examinations are only tenuously related to the legitimate purpose of voir dire. See generally, Air Force Standards for the Administration of Criminal Justice, standard 3-5.3(c) (promulgated 4 December 1989). Accord, ABA Standards for the Administration of Criminal Justice, Prosecution Function, standard 5.3(c).[2] However, no authority makes it error per se.

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[2] The federal civilian criminal courts have the opposite problem. "The rules [Fed. R. Crim. P. 24(a)] currently authorize federal judges to conduct voir dire examination and vest the judges with discretion as to whether counsel should be permitted to conduct voir dire. In practice, however, few federal judges permit counsel to questions prospective jurors directly." McMillion, Advocating Voir Dire Reform, ABA Journal, November 1991, at 114. McMillion described plans for an experimental program in which greater latitude would be given to counsel and stated the two opposing views.

On behalf of the proposal, two witnesses testified before the Senate Judiciary Subcommittee on Courts and Administrative Practice: "The judge does not have the intimate familiarity with the details of the case—details which may well alert an interrogator to important nuances in juror responses. Counsel, on the other hand, with the knowledge of all elements of the case, will recognize significant prob-

Instead, the military retains its traditional, generous approach which gives great latitude to counsel. See United States v. Smith, 27 M.J. 25 (C.M.A. 1988). Some of the inquiries, e.g. those related to the credibility of witnesses, have been considered before and found permissible. See, e.g., United States v. Huntsman, 22 U.S.C.M.A. 100, 46 C.M.R. 100 (1973). A military judge's ruling on an objection to voir dire is reviewable only for a clear abuse of discretion, and relief is warranted only when prejudice is shown. United States v. Parker, 6 U.S.C.M.A. 274, 19 C.M.R. 400 (1955). Absent plain error,[3] we find no abuse of discretion where the military judge only refrained from intervening sua sponte in a process in which counsel are given great latitude. The need for such intervention in this case was dubious. Furthermore, the trial counsel's questions were, as appellate defense counsel observed, "unimpeded by objections." Accordingly, any error was waived. R.C.M. 905(e).

II. Trial Counsel's Opening Statement

Appellant also complains that trial counsel's opening statement was improper because trial counsel commented on the association of the appellant with appellant's girlfriend, Miss Lee. She was the frequent supplier of the drugs abused by appellant and his friends. Appellant also

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lems in answers . . . and press essential points with further questioning." See also United States v. Holt, 33 M.J. 400, 411 (C.M.A. 1991).

Attributed to the Judicial Conference of the United States was the concern with which we are faced in this case, "that voir dire would take on the characteristics of a mini-trial as attorneys use their examination time to 'advocate the case, offer instructinos on the law, and otherwise influence or indoctrinate prospective jurors.' "

[3] See generally United States v. Fisher, 21 M.J. 327, 328 (C.M.A. 1986).

complains that trial counsel commented on the offenses of others (his associates who abused drugs, too). See generally, R.C.M. 913(b). Once again, we find no error warranting relief.

The first sentence in trial counsel's opening statement set the tone for the remainder:

> The evidence in this case will show that during the two year period between January 1987 and January 1989 the accused virtually lived on methamphetamine, virtually lived on crank.
>
> (Emphasis added.) From that introduction, trial counsel continued to describe in detail the expected testimony of his witnesses. Except in insignificant detail, the evidence was admitted as trial counsel forecast.[4]

Many of the witnesses were drug abusers themselves who abused drugs with the appellant and often with the ubiquitous Miss Lee. In the course of the opening, as in the course of examining each such witness, trial counsel disclosed the details of the witnesses' abuse of drugs and similar matters bearing on their credibility, choosing to disclose them himself instead of permitting appellant the advantage of revealing them through cross-examination.[5]

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[4] Thus, while State v. Williams, 63 Iowa 135, 18 N.W. 682 (1884), cited by appellant, was instructive and entertaining, it is readily distinguishable.

[5] At no point during his opening statement did trial counsel disclose that appellant's colleagues had themselves been convicted. As to this discrete issue, that fact makes appellant's case distinguishable from People v. Sullivan, 48 Ill. App. 3d 787, 362 N.E.2d 1382, 6 Ill. Dec. 462 (Ill. App. Ct. 1977), affirmed, 72 Ill. 2d 36 17 Ill. Dec. 827, 377 N.E.2d 17 (1978); State v. Aubuchon, 381 S.W.2d 807 (Mo. 1964); and State v. Fenton, 499 S.W.2d 813 (Mo. Ct. App. 1973), brought to our attention by appellant chiefly in connection with his complaint that his conviction rested on guilt by association.

We know of no rule that would confine trial counsel's opening in this setting. As we discuss below, the evidence of other misconduct of the witnesses and the involvement of Miss Lee was inescapable and not inadmissible. Therefore, there was no error when trial counsel described the testimony expected in good faith. R.C.M. 913(b), Discussion. See generally annotation, Prosecutor's Reference in Opening Statement to Matters Not Provable or Which He Does Not Attempt to Prove as Grounds for Relief, 16 A.L.R. 4th 810, § 15 at 875 (1982); 23A C.J.A. Criminal Law § 1240 (1989).

We further note that there was no objection at trial to any part of the trial counsel's opening statement.

The primary purposes for objections are to let the opponent correct the error, to inform the court so it can rule intelligently and quickly, and to reduce the necessity for reversal and new trial.

* * * * *

It follows from the foregoing rules that except under extreme circumstances, as where the matter involves the jurisdiction of the court, the failure of the accused to avail himself of the opportunity to object at the earliest opportunity to an irregularity of which he has knowledge will be deemed to be a waiver of the objection.

23A C.J.S. Criminal Law § 1150 (1989). Therefore, we hold that, absent plain error,[6] objection to improper opening statements is waived if not asserted at trial. R.C.M. 905(e). Cf. R.C.M. 920(c). We do not find plain error here.

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[6] See generally Fisher, 21 M.J. at 328.

III. Presentation of the Prosecution's Case

A. Human Lie Detector Testimony?

Appellant complains that an agent of the Office of Special Investigations was allowed to give his opinion of the credibility of other witnesses who were informants who worked for him. We think appellant tries to make too much of the testimony. He argues the issue as if it involved another version of "human lie detector" testimony forbidden under United States v. Harrison, 31 M.J. 330 (C.M.A. 1990), and United States v. Petersen, 24 M.J. 283 (C.M.A. 1987), but we hardly think the issue is that fancy. Instead, we take the testimony as relating to a trait of character of a witness, to be considered under Mil. R. Evid. 608(a).

"Human lie detector" testimony states that the witness is telling the truth about the relevant events at trial and thus invades a major function of the factfinder. Harrison stated the rule in the terms of that case, which involved allegations of child sexual abuse:

> It is impermissible for an expert to testify about his or her belief that a child is telling the truth regarding an alleged incident of sexual abuse.

31 M.J. at 332. Petersen implied that the rule might be broader than child abuse cases, 24 M.J. at 284 ("We are skeptical about whether any witness could be qualified to opine as to the credibility of another."), but, like United States v. Wagner, 20 M.J. 758 (A.F.C.M.R. 1985), pet. denied, 20 M.J. 425 (C.M.A. 1985), to which it refers us, Petersen also discusses the problem in terms of testimony by experts about the credibility of witnesses and impliedly about the testimony of those witnesses about the matter at hand.

Character evidence, in contrast, simply states that the witness is generally truthful, helping but not preempting

the factfinder. In oral argument appellant emphasized that the status of this vouching witness—an investigator—lent some special weight to his testimonial, and that might be true, but admissibility of testimony is not impaired by offering it through a knowledgeable witness, and the OSI agent was never made to seem to be an expert in the psychology of credibility. The more apt criticism of this transaction is that the witness couched his voucher in specific terms (These are among the best informants I've ever worked with), not general. Given that the agent had no other relationship with them, we hesitate to be too critical of the way the agent cast his assessment.

When the testimony is considered under Mil. R. Evid. 608(a), the next issue is whether the witness' credibility had been contested and, if not, whether the issue was waived by failure to object at trial. Mil. R. Evid. 103(a)(1). See also R.C.M. 905(e). The testimony did come after the attack, and there was no objection to it. Thus, appellant's assignment is without merit.

B. Involvement of the Members?

Trial counsel asked some of the appellant's cohorts whether they understood that the members could later be called in future prosecutions of the witnesses for perjury, were that to become necessary. When arguing findings, he reminded the members that appellant brought drugs into "your" base. Finally, while arguing sentence trial counsel argued that they should adjudge a dishonorable discharge "because that's what you [the members] deserve because you are members of the United States Air Force." Appellant compounds each of these complaints into a single assignment of error. He argues that trial counsel's method harmed appellant by distracting the members from their duty to be impartial triers of act and sentence, by stimu-

lating them to see themselves instead as witnesses, victims, and policemen. Once again, we think appellant exaggerates his complaint when he compounds several discrete ideas as if they showed an evil theme. We address each of the components separately below, as claims of error relating to examination of the witnesses, argument on findings, and argument on sentence, and we address them in the continuing chronological approach taken in this opinion.

The questions that appellant now finds objectionable were posed five times, each to different witnesses. In context, they seem to be trial counsel's enthusiastic effort to emphasize to the witnesses—themselves of poor character—the importance of telling the truth. They do not seem to be part of a strategy aimed particularly at involving the members in the prosecution or likely to have that effect. Indeed, on some occasions, trial counsel also referred to the possibility that he or the court reporter might also be called to recount the witnesses' testimony. In short, we think appellant exaggerates both the intent and effect. We further notice no objection made to the questions at trial, and therefore the issue was waived. Mil. R. Evid. 103(a)(1). See also R.C.M. 905(e).

C. Trial Counsel's Strategy: Guilt by Association

Reaching his major theme, appellant complains, in essence, that trial counsel erred by presenting evidence on the theory that appellant should be found guilty because of his association with Miss Lee and his cohort of fellow drug abusers, some of whom had been convicted by then.[7]

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[7] Compare United States v. Corbett, 29 M.J. 253, 258 (C.M.A. 1989) (Cox, J., concurring and dissenting), cert. denied, 493 U.S. 978, 107 L. Ed. 2d 508, 110 S. Ct. 506 (1989), with United States v. Rounds, 30 M.J. 76 at 82, 112 L. Ed. 2d 98, 111 S. Ct. 130 (1990).

The general rule is that "[a] defendant is entitled to be tried on his own without having his guilt prejudged by what has happened to another, it being considered an elementary principle of justice that one man shall not be affected by another's act or admission, to which he is a stranger." State v. Fenton, 499 S.W.2d 813, 816 (Mo. App. 1973). We do not take trial counsel's case as based on that theory, or even as involving it to such an extent that prejudice was possible.

1. Revealing the Prior Misconduct, Confessions, and Convictions of Others

Trial counsel brought five of the cohorts to testify that appellant had used drugs with them or supplied drugs to them. As he did, he disclosed through questioning the prior misconduct of each, including that unrelated to the charges against appellant. Each time, trial counsel began his direct examination by disclosing the witness's history of drug abuse and then moved on to disclose the adverse information in each witness' disciplinary history, from nonjudicial punishments for use of marijuana down to reprimands and counselings for bad checks. In the most egregious instance, trial counsel apparently sought to bolster a witness' credibility. He elicited from the witness that many of the people accused by the witness of drug abuse in the same investigation had later confessed when questioned, and trial counsel later showed by that witness and two others that one of the cohort (who did not testify) had been convicted. Inevitably, the prosecution's witnesses disclosed considerable misconduct of their own during their testimony about using drugs with appellant, getting drugs from him, and getting drugs from Miss Lee with him.

Generally, the fact that other people involved in the same episode hvae confessed says nothing about the guilt of an accused, and the ultimate confession—a plea of guilty—is inadmissible as proof of guilt of a person other than the one who made it, e.g., United States v. McLain, 823 F.2d 1457, 1464-66 (11th Cir. 1987); United States v. Solomon, 795 F.2d 747 (9th Cir. 1986). It might, however, add something to the credibility of the informant, and that is the obvious purpose for which it was offered here. Such evidence is admissible when offered for a purpose other than proving the accused's guilt, United States v. Campbell, 848 F.2d 846 (8th Cir. 1988); United States v. Roth, 736 F.2d 1222 (8th Cir. 1984), United States v. Edwards, 716 F.2d 822 (11th Cir. 1983) (rehabilitating the testimony of the witness whose plea was admitted), further proceedings at 795 F.2d 395 (11th Cir. 1986), cert. denied, 481 U.S. 1019 (1987).

However, the prosecution should not reveal the criminal convictions of the accused's co-actors, accomplices, co-accused, and co-coinsprators. See generally, 23 C.J.S. Criminal Law § 996 (1989); annotation, Prejudicial Effect of Prosecuting Attorney's Remarks, In Opening Statement to Jury, That Another Defendant Has Been Convicted or Pleaded Guilty, 48 A.L.R.2d 1004 (1956); annotation, Prejudicial Effect of Prosecuting Attorney's Argument or Disclosure During Trial That Another Defendant Has Been Convicted or Pleaded Guilty, 48 A.L.R.2d 1016 (1956). The other dispositions have no relevance to the accused's guilt, and the risk of prejudice can be significant. However, here, as in the instance of the confessions of others, there is no error if the evidence is not admitted to prove the accused's guilt by the adjudication of his associate. Campbell, 848 F.2d 846; Roth, 736 F.2d 1222. The proposition for which the other conviction was offered was clearly to show that the testimony of the witness in the

present trial was credible because it had been verified by the confessions and later convictions of those whom he accused.

To resolve this problem, we turn to the structured analysis offered in United States v. King, 505 F.2d 602, 607 (5th Cir. 1974), and widely cited in the cases discussing this sort of problem. First we examine the facts and circumstances of the case in their context. The only available witnesses to the essential events were the appellant's cohorts, and their drug abuse during those events was obviously subject to investigation and prosecution. The ideas that some of them had "turned" and accused others and that some of them had confessed when questioned are hardly shocking. The fact that some of them had confessed was elicited during direct examination before credibility had been attacked on cross-examination, but that attack was inevitable: Credibility was the only defense strategy. The fact that one of the cohort had already been convicted was elicited on redirect, after credibility of the witness concerned had been attacked on cross-examination. Next we turn to whether instructions were given or waived. We would have expected that the defense counsel would have asked for and the military judge would have given a limiting instruction, but they did not. The confessions and the conviction were not as greatly emphasized as appellant would suggest by his appellate rhetoric. Indeed the three references to the conviction were all fleeting, and the description of the other confessions was minimal. No one suggested the simplistic syllogism that others had confessed or been convicted and therefore the appellant must also be guilty. There was no objection at trial, and that is likely the result of the defense's decision to let that matter pass quickly. Under these circumstances, we conclude that if the omission of an instruction was error, it was harmless beyond a reasonable doubt. We do not encourage admis-

sion of this sort of evidence, but we do not find it to constitute an abuse of discretion in this case.

2. Prior Consistent Statements.

We now turn to yet another issue that results from trial counsel's tactics: Was it error to admit against the appellant the prior inculpatory statements made by the witnesses? Trial counsel introduced several such statements[8] as prior consistent statements after the defense sought on cross-examination to show the witnesses' prior inconsistencies. Mil. R. Evid. 613, 801(d)(1). Trial counsel's tactical coup had significant value because it put 19 written statements from his witnesses into the hands of the court-martial whose members could take them – unlike oral testimony – into deliberations, thus giving permanence to the testimony that oral testimony would otherwise lack. It was a clever maneuver that trial counsel had obviously planned: By disclosing the misconduct of the witnesses on direct, he deprived defense counsel of the fodder for cross-examination in most areas other than prior inconsistencies. When the defense waded into that swamp, it probably waded into a trap, but there appears from the record to have been little choice for the defense but to make whatever dents in the credibility of the prosecution's witnesses it could make. However, neither the sparce opportunity for defense strategy nor the trial counsel's cleverness make the gambit illegal. The cited rules provide for the maneuver, and trial counsel did no more than to make the most of his opportunities.

In this connection we have also considered whether those statements should have been admitted. They were

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[8] Prosecution exhibits, 8, 9, 10, 11, 12, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28.

given to investigators after the declarants had become aware that they were themnselves suspects, a time when it is not unknown for members of the drug subculture to try to "buy" their way out of trouble with information; they had a motive to sing, and no particular motive to sing truly. "Most courts have read into the provision [Mil. R. Evid. 801(d)(1)(B) and its civilian counterpart, Fed. R. Evid. 801(d)(1)(B)] the traditional requirement that the prior statement had been made prior to the time at which a motive to falsify testimony would have arisen." S. Saltzburg, L. Schinasi, D. Schlueter, Mititary Rules of Evidence Manual 614 (2d ed. 1986).

The drafters' analysis that accompanies Mil. R. Evid. 801(d)(1)(B) acknowledges the civilian judicial limitation on the civilian federal rule but does not tell us what the President's intent was when he promulgated the Military Rules of Evidence under his authority under Article 36(a), UCMJ, 10 U.S.C. § 836(a) (1988). (The federal circuits were then split.) The Court of Military Appeals had also noticed the controversy in United States v. Hurst, 29 M.J. 477 (C.M.A. 1990), decided just days after this trial, but it had not resolved in until a month after this trial was over, in United States v. McCaskey, 30 M.J. 188 (C.M.A. 1990), holding that such statements may not be admitted unless made before a motive to fabricate has arisen. See also United States v. Morgan, 31 M.J. 43 (C.M.A. 1990). McCaskey gives no direction on whether its approach should apply retroactively to a case like appellant's tried when the matter was not settled. We see the McCaskey approach as a significant departure from the plain words of the rule, and, in the absence of an objection at trial, cf. Morgan, 31 M.J. 43, we are not disposed to apply it

retroactively to appellant's case.[9]

Until McCaskey, Air Force practice was governed by United States v. Nelson, 21 M.J. 711 (A.F.C.M.R. 1985), affirmed, 25 M.J. 110, cert. denied, 484 U.S. 1061, 98 L. Ed. 2d 982, 108 S. Ct. 1016 (1988). Nelson held, as Saltzburg et al. noted at the cited passage in their Manual, that the question is really one of relevance, a test as to which reasonable people can come to many positions.

Such a decision by the military judge (assuming a timely objection) would be reviewable for abuse of discretion. E.g., United States v. Orsburn, 31 M.J. 182, 187 (C.M.A. 1990). The prior statements in this case were, of course, Mainly repetitions of the in-court testimony. Thus, their greatest hazard was cumulativeness, a matter as to which military judges are given considerable latitude. The permanence—consideration of these written statements during the deliberation—was tactically valuable, as we noted above, but the value was little more than to memorialize the in-court testimony. Thus, in this pre-McCaskey case we are unwilling to find that it was an abuse of discretion to admit them, and we are even less willing to find plain error in the decision to do so, especially in the absence of an objection at trial. Mil. R. Evid. 103(a), (d). The law of

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[9] McCaskey remarked, "This evolutionary background of Fed. R. Evid. 801(d)(1)(B) . . . convinces us that its counterpart, Mil. R. Evid. 801 (d)(1)(B), generally was intended to be limited to prior consistent statements made before the alleged recent fabrication . . . ," 30 M.J. at 192 (emphasis added), suggesting that retroactivity would be appropriate because the rule was ever intended to be as it was finally disclosed to be in McCaskey. Were we to take that approach, we would find that the defense waived any objection by its failure to object at trial. Mil. R. Evid. 103(a). Later, when considering appellant's argument that his counsels' several waivers were ineffective assistance, we would excuse this particular waiver because the law was hardly as clear before McCaskey as it has become since.

prior consistent statements was, at the time of this trial, permissive enough to permit trial counsel's gambit.

We also note that trial counsel's maneuvers stayed clear of the hazard of admitting confessions of others that deny confrontation ato the accused. See Bruton v. United States, 391 U.S. 123, 20L. Ed. 2d 476, 88 S. Ct. 1620 (1968). In each instance, these statements were given by persons who appeared at trial as witnesses and waived their rights to silence by testifying, making themselves fully available for cross-examination. See Mil. R. Evid. 306. There was no denial of the right to confrontation.

3. Miss Lee

Miss Lee was as ubiquitous in the evidence as she appears to have been in appellant's life, and her distributions and uses of drugs were part of the course of transactions that made up this case. It is only coincidental (but still relevant) that many named Miss Lee as the source for much of the drugs abused and often present when they were used. Her activities were an intricate part of the proof of the accused's own drug abuse because he was involved in them. They were part of the circumstantial case against him and entirely relevant and admissible.

Appellant was not convicted because he was associated with proven drug abusers or with Miss Lee; he was convicted because the evidence that he abused drugs was overwhelming.

D. Use of a Blackboard Not Admitted

Appellant argues that the record of trial is incomplete because it includes no description or picture of a blackboard that trial counsel used throughout the trial. Article 54(c), UCMJ, 10 U.S.C. § 854(c) (1988). See United States v. Sneed, 32 M.J. 537 (A.F.C.M.R. 1990); United States

v. Kyle, 32 M.J. 724, 725-26 (A.F.C.M.R. 1991). From that premise, he argues that we may approve no more of the sentence than that for which a summarized record is permissible, substantially less than that adjudged and approved below. Compare Article 54(c)(1) with Article 54(c)(2).

While the code prescribes that appellant's record must be "complete," the details of what constitutes "complete" have been left in part to the President's rulemaking. The required contents of a record are stated at R.C.M. 1103(b)(2) and (3). Exhibits must be included in the record (or substitutes for them). R.C.M. 1103(b)(2)(D)(iv). Exhibits are included because they are evidence. However, the blackboard was not an exhibit. It was a summarization of the case and testimony made by trial counsel as he went along, but it was not evidence itself. Accordingly, there was no need to mark it, move its admission, or designate it as an exhibit by number or letter.

The blackboard never was marked as an exhibit, and properly so. Because it wasn't, there was never the chance for its admission to be denied, and so there was no need to include it in the record as an exhibit moved but excluded. R.C.M. 1103(b)(3)(B).

The blackboard was never evidence itself. It was simply an illustration or graphic aid. Such aids are not required by R.C.M. 1103(b)(2) or (3) to be included in the record to constitute a "complete" record.[10] The record is not in-

[10] This is consistent with what appears to be the prevailing practice in civil litigation. See annotation, Counsel's Use, in Trial of Personal Injury or Wrongful Death Case, of Blackboard, Chart, Diagram, or Placard, Not Introduced into Evidence, Relating to Damages, 86 A.L.R.2d 239 (1962); annotation, Counsel's Use, in Trial of Condemnation Proceeding, of Chart, Diagram, or Blackboard, Not Introduced into Evidence . . . , 80 A.L.R.2d 1270 (1961); annotation, Counsel's Use, in Trial of Negligence Case, of Chart of Diagram, Not

complete.[11]

IV. Trial Counsel's Argument on Findings

Appellant has two complaints about trial counsel's argument on findings. First he complains that trial counsel alluded to the situs of one of the crimes as "your Air Force base," and next he complains that trial counsel's argument as to the accomplice testimony instruction was improper. We address each issue separately below.

Trial counsel argued findings twice, first in detail for 12½ pages, and then, after a brief page and a half in rebuttal, he closed –

> Gentlemen, you've had all the evidence you need. Tons of evidence. And in your gut you know. You know what the answer is. The answer is that that man sitting across from you is guilty of the wrongful use of crank on 60 occasions. Of the wrong distribution of crank on two occasions at least. And the wrongful introduction of crank onto your Air Force base. Thank you.

The court-martial was tried at Yokota Air Base in Japan. The members were (we surmise from their organizational zip codes) all from that base. The charge to which trial counsel alluded alleged introduction of methamphetamine onto Yokota Air Base. The argument was factually correct.

Introduced into Evidence, Relating to Damages, 44 A.L.R.2d 1205 (1955).

[11] We hasten to add that the blackboard could easily have become an appellate exhibit if there had been any controversy about its use. For example, had the military judge overruled a defense objection concerning the appearance of the blackboard (including what was written on it), it would have been necessary to make a record on the objection adequate that we could review it on appeal. That could be done by describing the blackboard and the objectionable aspects of its appearance or use, or by photographing it, or both.

However, factual correctness is not enough to save an argument that is calculated to induce the members to abandon rationality if there is a fair risk that they did. This example of forensic adventurism personalized the allegations, and we think there is some risk that such a tactic could succeed in doing so generally, but not here. Here the comments could at worst only remind the members of the coincidences of geography already acutely obvious after a lengthy trial. Not every reference to the locale and community must be forbidden on pain of retrial,[12] and this one is so brief, so quickly passed that we hold that the military judge did not err by not giving an instruction sua sponte. United States v. Nelson, 1 M.J. 235, 237-39, n.6 238 (C.M.A. 1973). The argument drew no objections, so any error was waived. R.C.M. 801(g), 905(e), 919(c).

Appellant also brings to our attention the prior, unpublished decision of a panel of this Court in United States v. Stafford, ACM 28715 (A.F.C.M.R. 20 February 1991), relating to the accomplice testimony instruction, and complains that trial counsel misstated that instruction in his closing argument:

> Listen to that accomplice instruction and remember this. Remember this; that the accused and the people

[12] Compare arguments that seek to induce a jury to meet the supposed expectations of their community that the jury will convict, annotation, Prejudicial Effect of Prosecuting Attorney's Argument to Jury that People of . . . Community Want or Expect a Conviction, 85 A.L.R.2d 1132 (1962); arguments in which various, repeated, persistent, or pervasive abuses compound the damage into plain error requiring correction despite waiver, e.g., People v. Fielding, 158 N.Y. 542, 53 N.E. 497 (1899); arguments in which unproven tax expenses are brought to the attention of the jurors as taxpayers, e.g., Taylor v. State, 123 Fla. 358, 166 So. 825 (1936), and annotation, Counsel's Appeal in Criminal Case to Self-Interest of Jurors as Taxpayers, . . ., 33 A.L.R.2d 459 (1954). The arguments in this case approached none of those landmarks of error.

> who testified against him are accomplices only if they used with the accused. If they didn't use with the accused, they are not accomplices. It's only when you conclude that they have used crank, methamphetamine, with the accused that they become accomplice's to the accused's crime.

In Stafford our brothers found erroneous the instruction that –

> a witness is an accomplice only if you believe that the accused is guilty . . . .

Emphasis added. Appellant argues that the trial counsel's argument, "used with the accused," is tantamount to "accused is guilty" in Stafford and should reap the same remedy.

We disagree. Argument is not of the same importance as instructions. A minor misstatement in argument can be overlooked, and, without an objection, is likely to be waived, as this issue was, R.C.M. 801(g), 905(e), 919(c), if indeed there was any error. An error in instructions can also be waived by failure to object, but this error is so fundamental in the instructions that our brothers in Stafford found it to constitute plain error not waived by failure to object at trial. Is the trial counsel's argument in this case of the same character? We think not.

First, the correct statement of law was given in the military judge's later instructions that "a witness is an accomplice if he was criminally involved in an offense with which the accused is charge." Second, his instructions also included the admonition that "I will give you the law," and "I will give you general guidance on evaluating the witnesses' testimony," and "the arguments of counsel . . . are not evidence." These two measures attenuated and presumably overcame any confusion that might have flowed from trial counsel's argument.

Third, trial counsel's argument did not so misstate the law as to present the problem in Stafford, that the members might be required to adjudicate guilt before considering credibility. Trial counsel's argument did not address guilt, but only the circumstances. Thin as the line might be, it was not crossed here. There was no error.

V. Trial Counsel's Sentencing Argument

Trial counsel remarked in sentencing argument that the members "deserved" that appellant receive a dishonorable discharge. Trial cousenl also argued that the accused was "a disgrace" who had not "acknowledged [the members'] findings."

To argue to the members that they "deserve" that an accused receive a punitive discharge is consistent with the objective of that punishment: It distinguishes those whose separations from the Service have been under unsatisfactory circumstances from those whose separations follow years of faithful and unblemished service. The punitive effect of so discriminating and labeling punitive separations is simply the reflection of discriminating and labeling unblemished service. Just as the trial counsel's argument suggests, the value of complimentary characterizations of separation would be entirely deflated if the separations of criminals were not appropriately characterized. In that sense, the trial counsel's argument is entirely correct. Though it personalized the interest of the members in the sentence, it did not invite any departure from rationale decisionmaking. Cf. United States v. Shamberger, 1 M.J. 377 (C.M.A. 1976). We do not condone it, because the trier of sentence should not personalize the task, but we do not find that it was error.[13]

[13] We have not found precedent on exactly this argument, except to discover that a very similar argument is recorded in United States v. Sturdivant, 9 M.J. 923, 927 (A.C.M.R. 1980) but not evaluated.

Appellant's second complaint about the sentencing arguments presents another of the endless variations by which trial counsel seek to bring attention to the unrepentant state of mind of an accused, this time by stating that appellant did not "acknowledge" the members' findings. His situation lies somewhere in the area confined by United States v. Johnson, 1 M.J. 213 (C.M.A. 1975), United States v. Gibson, 30 M.J. 1138 (A.F.C.M.R. 1990), and United States v. Chaves, 28 M.J. 691 (A.F.C.M.R. 1989).

This argument is immediately distinguishable from that in Johnson, wherein there was direct, explicit comment about the fact that the accused had pleaded not guilty. See also United States v. Turner, 30 M.J. 1183 (A.F.C.M.R. 1990); United States v. Jones, 30 M.J. 898 (A.F.C.M.R. 1990). "Has not acknowledged your findings" brings attention to refusal to admit defeat, not to the legitimate choice to fight.

In Chaves we held erroneous an instruction that the members could consider the accused's failure to express remorse when deliberating on sentence. Chaves, however, was about instructions, not argument. We have declined to extend the Chaves idea to argument. Gibson, 30 M.J. 1138; United States v. Ryder, 31 M.J. 718 (A.F.C.M.R. 1990); United States v. Kilbourne, 31 M.J. 731 (A.F.C.M.R. 1990).

Finally, this case is not one in which trial counsel argued that the accused must admit guilt before becoming eligible for rehabilitation. Gibson, 30 M.J. 1138; Jones, 30 M.J. 898.

The trial counsel's remarks in this case appear not to have broken any rules, but we also note that the arguments drew no objections, so any error was waived. R.C.M. 801(g), 905(e), 919(c), 1001(g); United States v. Sherman, 32 M.J. 449 (C.M.A. 1991).

VI. Effective Assistance of Counsel

Having brought our attention to a variety of claimed errors, all of which were waived by failure of the trial defense counsel to object, appellant now points to those waivers as the mistakes that show ineffectiveness of defense counsel amounting to a denial of the Sixth Amendment right to counsel under Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). See generally, United States v. Barnard, 32 M.J. 530 (A.F.C.M.R. 1990), pet. denied, 33 M.J. 484 (C.M.A. 1991).

The first step in the Strickland analysis requires that we examine the defense counsel's decisions. These decisions have a uniform explanation readily apparent from the record: The defense wished to focus on the inherent lack of credibility of the prosecution's witnesses. Thus, the trial counsel's efforts to explain away their deficiencies entailed necessarily repeated disclosures of those deficiencies. Each time trial counsel dealt with the subject on voir dire, in opening statement, and on the merits he renewed the court-martial's attention to the central, unifying theme of this case: The witnesses were themselves long term drug abusers deeply rooted in the criminal milieu, not to be trusted except perhaps after careful evaluation. No wonder the defense had no objections.

Furthermore, we have disposed of many of the foregoing issues on both waiver and on grounds other than waiver. Even the question whether the prior consistent statements should have been admitted, but for the absence of an objection, is not such obvious error that we would call the choice not to object a Strickland ineffectiveness. Thus, it is fair to say, with the hindsight of appellate decision our advantage, that few of the trial decisions of which appellant now complaints were errors. There was no deficiency in trial defense counsel's representation.

However, we can also skip the first step in the Strickland analysis and go straight to the second: Is there prejudice? The evidence in this case was overwhelming. The drug abuse being in this case a social activity, all of appellant's cohorts were called and made to testify against him. Even if one clipped out all the tactical gimmickry of the trial counsel, a conviction remained inevitable, and the sentence is not excessive, as we must discuss below.

VII. Sufficiency of the Evidence

Appellant moved to file statements from two of his companions in post-conviction confinement. He cited as his authority for thus supplementing the record Article 66(c), UCMJ, 10 U.S.C. § 866(c) (1988), and United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).[14] We now address his motion, the two statements, and the issues of evidentiary sufficiency that have been raised in them.

Appellant's purpose in bringing the two statements to our attention is to further contest the credibility of the witnesses at trial. However, the record may not be supplemented for that purpose. Instead, Article 66(c) limits us to "the entire record." United States v. Dickerson, 6 U.S.C.M.A. 438, 20 C.M.R. 154 (1954); United States v. Whitman, 3 U.S.C.M.A. 179, 11 C.M.R. 179 (1953); United States v. Gordon, 2 U.S.C.M.A. 632, 10 C.M.R. 130 (1953). Accordingly, we have not considered the statements when addressing the issues of sufficiency of the evidence.[15]

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[14] Appelle opposed the motion timely. We deferred our decision on the motion until now to assure that, in this complicated case, we had before us a much as might become available before we decided whether to grant the motion.

[15] To this extent, appellant's motion to file documents, dated 6 September 1991, is denied.

"The test for [legal sufficiency] is whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." United States v. Turner, 25 M.J. 324, 324 (C.M.A. 1987) (citing Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979). The test for factual sufficiency is "whether, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987). We have applied both tests, as we are required to do by Article 66(c), UCMJ, 10 U.S.C. § 866(c) (1988). We have taken into consideration that the convictions rest on the testimony of other drug abusers. United States v. Ladell, 30 M.J. 672, 674 (A.F.C.M.R. 1990). We find that the evidence was sufficient as a matter of law to sustain the findings of guilt, and we are ourselves convinced beyond a reasonable doubt that appellant is guilty as convicted.

However, appellant's motion and the statements might be taken (if very generously considered) as a layman's petition for a new trial under Article 73, UCMJ, 10 U.S.C. § 873 (1988) and R.C.M. 1210 on the grounds of fraud on the trial court. Both authorities require that such a petition be filed with The Judge Advocate General, even when this Court has jurisdiction of the case. R.C.M. 1210(c) prescribes the form of such petitions, and this one does not comply. Finally, we do not find the two statements to be the kind of evidence that "would probably produce a substantially more favorable result for the accused," R.C.M. 1210(f)(2)(C), or that the fraud now alleged "had a substantial contributing effect on a finding of guilty," R.C.M. 1210(f)(3). See United States v. Giambra, 33 M.J. 331 (C.M.A. 1991). A new trial is not warranted.[16]

[16] Accordingly, taking the motion as for a new trial, it is denied.

VIII. Sentence Appropriateness

Appellant also argues that his sentence was inapproriately severe. He was sentenced by the members to be discharged from the service with a dishonorable discharge, confined for 7 Years, forfeiture of all pay and allowances, and reduction to E-1. We have examined the entire record, United States v. Healy, 26 M.J. 394 (C.M.A. 1988), the convictions, and the sentence, giving due consideration to the characteristics of this offender and to the crimes of which he was convicted. We note that he was sentenced for divers drug offenses over a 2-year period in three different countries, including introduction, distribution, and use of methamphetamine. We take notice of the lengthy history of this Court's acknowledgements of the seriousness of drug crimes, see, e.g., United States v. Baker, 2 M.J. 360 (A.F.C.M.R. 1977), and our insistence that the penal hazards are widely known, see, e.g., United States v. Holt, 28 M.J. 835 (A.F.C.M.R. 1989). One who persists despite the explicitly clear warnings, now emphatically declared, does so at his own risk that, as the plague continues, triers of sentence will express the ever increasing disapproval of the community. We are satisfied that the sentence is not inappropriate. Healy, 26 M.J. 394; United States v. Wingart 27 M.J. 128 (C.M.A. 1988); United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982); United States v. Ciulla, 29 M.J. 868 (A.F.C.M.R. 1989), aff'd, 32 M.J. 186 (C.M.A. 1991), cert. denied, 116 L. Ed. 2d 135, 112 S. Ct. 172 (1991).

VIII. Petition for Habeas Corpus During Appeal

During the pendency of the appeal in this case, appellant petitioned this Court for extraordinary relief in the nature of habeas corpus. In short, he sought release from post-conviction confinement during appeal. We have

authority under the All Writs Act, 28 U.S.C. § 1651 (1988) to fashion such relief, Moore v. Akins, 30 M.J. 249 (C.M.A. 1990), but we did not find it necessary to do so.

The following chronology summarizes the factual background of this issue:

Date:	Event:	Since Sentenced	Since Rec'd	Interval
13 Mar 90	Appellant sentenced	0 day		
25 Jun 90	Record rec'd TJAG	104 day		
27 Jun 90	Both counsel appeared	106	0 day	
22 Feb 91	Last defense brief	346	242	242 days
23 May 91	Petition for habeas	436	332	90 days
28 Jun 91	Government replied	472	368	119 days*

(* From last defense brief.) We find it ironic and disturbing that appellant would so long delay his most important step in our Court and then, after passage of much less than half the time he needed, claim foul and demand release when his opponent had not yet replied.

Such a petition was recently addressed by our sister, the Coast Guard Court of Military Review, in Addis V. Thorsen, 32 M.J. 777 (C.G.C.M.R. 1991). Chief Judge Baum's excellent analysis in that case persuaded us that such a petition may warrant relief only when the petitioner has previously applied to the convening authority for deferment of the adjudged confinement. See generally Article 57(d), UCMJ, 10 U.S.C. § 857(d)(1988); R.C.M. 1101(c). Appellant did not do so.

Appellant argues that he should not be required to undertake a fruitless effort. He reports that the same convening authority had already announced in unrelated cases that he lacked authority to defer confinement after action. Assujing that report to be accurate, the convening authority's impression of his authority was mistaken. Morre v. Akins, 30 M.J. at 251-52. MOore was decided 3 months after appellant was convicted, but also 3 months before

the convening authority acted in this case. Thus, when we view Moore as the proclamation of a new idea, we conclude that appellant had plenty of time to learn of it and to inform the convening authority of the actual extent of his authority.

To make our point explicit, we hold that an appellant must ask the convening authority for the relief the appellant seeks before that appellant may appeal for extraordinary relief from a denial by that convening authority. R.C.M. 502(d)(6) ("Defense counsel shall represent the accused . . . ."). this appellant never asked and never brought to the convening authority's attention the extent of the authority to defer that was revealed in Moore. He has shown no reason to be relieved from the consequences of his failure, which leads under Addis to denial of his petition. Accordingly, we denied his petition. We will not entertain appeal by ambush any more readily than we will permit trial by ambush.

IX. Military Judges, Appellate Military Judges & Tenure

Appellant also assigns as error that he was tried by a court-martial the military judge of which lacked tenure and that his appeal must be decided by appellate military judges who lack tenure. See generally, Articles 26 and 66, UCMJ, 10 U.S.C. § 826 and 866 (1988).

The Supreme Court of the United States has twice taken note of this difference in our system, but neither time has it been critical. In United States ex rel. Toth v. Quarles it wrote,

> For instance, the Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will."

350 U.S. 11, 1776 S. Ct. 1, 100 L. Ed. 8 (1955). See also Palmore v. United States, 411 U.S. 389, 404, 36 L. ED. 2d 342, 93 S. Ct. 1670 (1973).[17]

Once again we are fortunate to have the help of our sister court, here the Navy-Marine Corps Court of Military Review. It has reviewed the issue in its order in United States v. Graf, 32 M.J. 809 (N.M.C.M.R. 1990), apparently the first published opinion to examine the issue closely. Like our sister, we hold that there is no constitutional right of a military accused to be tried only in a court-martial the military judge of which enjoys tenure or to have his appeal decided by a court of military review the appellate military judges of which enjoy tenure.

With commendable diligence and candor,[18] appellant brings our attention to our prior (unpublished) decision in United States v. Rivera, ACM 24487 (A.F.C.M.R. 24 May 1985) (per curiam), affirmed, 23 M.J. 89 (C.M.A. 1986), cert. denied, 479 U.S. 1091 (1987). We wrote then,

> Whether or not to require any sort of tenure or term of office for military judges, on either the trial or appellate level, is a matter of policy to be determined by Congress, the President, or the Department of the Air Force. However, until such time as that occurs, this issue is without merit.

We have considered appellant's comparative law argument, and we have considered also the oddly scattered

[17] Appellant brought to our attention that the judges whose terms were examined in Palmore enjoyed fixed terms of 15 years, much unlike military trial and appellate judges, who have no such terms. We do not hold Palmore to its facts. We read it broadly enough to predict that the Supreme Court would find our system constitutionally satisfactory.

[18] See Air Force Rules of Professional Responsibility, rule 3.3(a)(3)(1989). Accord, ABA Model Rules of Professional Responsibility, rule 3.3(a)(3)(1983).

protections of this Court and trial courts-martial,[19] but we inevitably return to our conclusion in Rivera: This is a legislative matter. Nothing has changed.

The findings of guilty and the sentence are correct in law and fact and, on the basis of the entire record, they

AFFIRMED.

Chief Judge O'BRIEN and Senior Judge PRATT concur.

Senior Judge O'HAIR did not participate.

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[19] For examples, both trial courts-martial and the courts of military review are protected from coercion and unlawful influence by Article 37(a), UCMJ, 10 U.S.C. ⅛ 837(a)(1988), but only military judges – not appellate military judges – enjoy the fitness report protection of Article 26(c). Instead, the protection of appellate military judges extends only to comments by another appellate military judge. Article 66(g), UCMJ, 10 U.S.C. ⅛ 866(g) (1988). Thus, while a trial judge's decision may not be considered in performance reports and assignments, presumably an appellate judge's may. We also note that the Court of Military Appeals is "located for administrative purposes only in the Department of Defense," Article 141, UCMJ, 10 U.S.C. 9 941 (Supp. I 1990), but the courts of military review are required by the statute to be established and manned by "each Judge Advocate General," Article 66(a). To some extent, these differences reflect the evolution of the code, and its oddities are mere vestiges of its past. Our sole point today is that such oddities remain lawful choices of the Congress, and therefore they are not ours to change.

APPENDIX F

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 68201/AF
CMR Dkt. No. 28983

UNITED STATES, APPELLEE

v.

WILLIAM T. LIPSCOMB (315-60-5584), APPELLANT

On consideration of the granted issues in the above-styled case in light of *United States v. Graf*, 35 MJ 450 (CMA 1992) (as to Issue I) and *United States v. Weiss*, 36 MJ 224 (CMA 1992) (as to Issue II), it is by the Court this 20th day of August, 1993

ORDERED:

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

Judge CRAWFORD concurs in the result per her separate opinion in *United States v. Weiss*, 36 MJ 224 (CMA 1992).

Chief Judge SULLIVAN and Judge WISS dissent for the reasons stated in their separate opinions in *United States v. Weiss*, 36 MJ 224 (CMA 1992).

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (ANDIA)
Appellate Government Counsel (PETERSON)

APPENDIX G

UNITED STATES COURT OF MILITARY APPEALS

No. 68,005
CMR No. 29009

UNITED STATES, APPELLEE

v.

JAMES N. COPPOCK, SENIOR AIRMAN
U.S. AIR FORCE, APPELLANT

Argued April 7, 1993
Decided June 25, 1993

Counsel

For Appellant: *Captain Ursula P. Moul* (argued); *Colonel Terry J. Woodhouse* (on brief); *Major Alice M. Kottmyer.*

For Appellee: *Major John H. Kongable* (argued); *Colonel Richard L. Purdon* and *Lieutenant Colonel Jeffery T. Infelise* (on brief); *Lieutenant Colonel Brenda J. Hollis.*

Military Judge: JAMES A. YOUNG, III

Opinion of the Court

CRAWFORD, Judge

Pursuant to his pleas, appellant was convicted of two separate desertions, escaping from confinement, carnal

knowledge, two automobile larcenies, assault on a civilian police officer, and kidnapping a 4-year-old child, in violation of Articles 85, 95, 120, 121, 128, and 134, Uniform Code of Military Justice, 10 USC §§ 885, 895, 920, 921, 928, and 934, respectively. He was sentenced to a dishonorable discharge, confinement for 25 years, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved the sentence, except for confinement exceeding 19 years. The Court of Military Review affirmed the findings and sentence in an unpublished opinion dated April 2, 1992. We granted review on the following issue:

> WHETHER THE MILITARY JUDGE COMMITTED AN ABUSE OF DISCRETION BY DENYING APPELLANT'S CHALLENGES FOR CAUSE AGAINST LIEUTENANT COLONEL JASPER AND MAJOR McDUFFIE.

We resolve this issue adversely to appellant.

On March 26, 1990, appellant was lawfully ordered into pretrial confinement at Keesler Airforce Base confinement facility. On April 17, 1990, he escaped from confinement. The next morning Airman Coppock appeared at a Ford dealership about fifteen to twenty miles from the Air Force base. He asked to see a small, fuel-efficient car. He was shown a Ford Festiva. During the test drive, he drove away from the salesman as they stopped to exchange seats. About 45 minutes later he was spotted at a local gas station. The civilian authorities were notified, and he was apprehended following a high-speed chase.

After appellant's pleas of guilty were accepted, court members were sworn and voir dire took place. Appellant claims that the judge abused his discretion when he did not grant appellant's challenges for cause against Lieutenant Colonel Jasper and Major McDuffie.

During the individual voir dire, Lieutenant Colonel Jasper answered as follows:

Questions by the Military Judge:

Q: [W]hat we would like to find out is what you've heard or read or seen about this case, if anything.

A: Do you want me to just answer the general question, sir?

Q: Please.

A: I do remember seeing on TV when Airman Coppock left the security here at Keesler and there was some television coverage of that, that he—he had escaped and was gone for some time and was apprehended by civilian authorities in southern Mississippi, that there was some sort of a chase involved in it, and at the end of that chase, I think there was a car crash and Airman Coppock needed some medical attention after that.

Q: Anything else that you remember?

A: Oh, general circumstances about why he was confined concerned coming here from Spain with a minor and a small child—abducting a small child; but only in generalities.

Q: Did the media coverage cause you to form an opinion as to whether the accused actually committed all the offenses suggested in the coverage?

A: I don't believe so, no.

Q: Did the media coverage cause you to form any personal animosity towards Senior Airman Coppock?

A: No.

Q: Did the media coverage or what else you may have learned about the case cause you to form an opinion as to an appropriate kind or amount of punishment to impose in this case?

A: No.

Q: Now, I've already told you that the accused entered a plea of guilty and I found him guilty of the offenses that you have before you and evidence is going to be presented later in the trial so that the members can decide on an appropriate sentence for this accused. Can you lay aside any impressions you might have formed because of what you heard about this case and determine an appropriate sentence for this accused based solely upon the evidence you hear in this court?

A: Yes.

* * *

Questions of Trial Counsel:

* * *

Q: Sir, you mentioned that you had some awareness of what you described as the general circumstances about why Airman Coppock had been confined. Was that something you also heard on television broadcasts?

A: I think that is where I picked up the information solely. I don't remember reading about it in the newspaper.

Q: Do you remember this being a single television broadcast that you saw or was this over a course of several days?

A: I really—I really couldn't tell you.

Q: I know we're asking you to think back in time, but can you recall about how long it's been since you recall having been exposed to this information at all?

A: Oh, it was in February, I believe.

Q: On the 27th of April, do you remember receiving a directive from Major General Harvey to avoid any media coverage related to this accused or the facts surrounding the case?

A: I do.

Q: Have you done that since the 27th?

A: I have.

Q: Other than this one television broadcast that you described for us, do you believe that you have been exposed, even inadvertently, to any coverage before or after the 27th of April?

A: I have not since the 27th of April. Aside from what I described, I can't remember any other time, no.

Q: Do you understand, as the judge has explained to you, the importance of your decision in this case being based upon the evidence that comes before you in the courtroom, do you not?

A: I do.

Q: Do you believe that you are able to limit your judgement on the amount and type of punishment that Airman Coppock should receive to the facts that you consider here in the court and not something that you heard about during a television broadcast?

A: Yes.

Q: Do you also believe that it will be possible for you to avoid, as the judge has instructed you, any continued exposure to media coverage from this point forward until the trial concludes?

A: Yes.

TC: Nothing else, sir.

MJ: Captain Miller?

Questions by Defense Counsel:

Q: [W]hat were your thoughts when you saw that coverage on TV?

A: The—my primary thoughts at that time were that we were going through a major command inspection and this was a heck of a time for this to happen.

Q: Did that inspection include part of your group?

A: It did.

Q: Any other thoughts?

A: That it was, primarily, and I can't—I'm trying to remember. Yes, that was my major thought and that I hope he was reapprehended quickly.

Q: Was that because you felt he presented a danger?

A: No, just because he had been in confinement and shouldn't—should not have escaped and we needed to get him back into confinement.

Q: Did you take any measures, any steps in response to your personal life or in your professional life?

A: No, neither.

Q: You read the letter that General Harvey sent out?

A: Yes.

Q: What did you do to try to implement this?

A: Well, I showed it to my wife; and, as I said earlier, I don't subscribe to the paper; but, since that time, I have not read anything in the paper or anywhere else concerning the case; and I have not heard anything on the television news, radio news, or any kind of news concerning the case until this morning before I came to work; and I heard Airman Coppock's name; and I left the room. Actually, I was on my way out of the room anyway and I heard it; and I just kept going; and I didn't hear anything besides his name.

Q: Did it say that they were going to have a trial today or –

A: I don't know. Again, I heard the name and about that time, my wife, who read the letter, told me that I – that something was on TV about the trial. I don't remember exactly what she said, but I just kept going out of earshot of the TV; and I – I didn't hear anything besides his name.

Q: Has anything about this case come up in any official correspondence that you've seen, any staff meetings that you've been at?

A: No correspondence and I don't think it was talked about in the staff meetings. Not that I can recall.

Q: How about the impact of that on the inspection that was going on?

A: That's what I was trying to remember, whether anybody had mentioned it at staff meetings. If it did come up, I don't remember it. I wouldn't swear either way; but I don't remember any comments.

Q: Any casual conversations you can recall about – with other people about the case?

A: No. Yes, but just – just, again, that someone had escaped during the – during the inspection, wasn't that bad timing, and, again, hope that he would be apprehended.

Q: Do you attend any status of discipline meetings on Keesler?

A: No.

Q: Do you have any personal or professional reason to have contact with the media?

A: No.

During individual voir dire, Major McDuffie stated:

Questions by Military Judge:

Q: Would you tell us what you heard about this case or saw on TV before you came into court today?

A: The last thing I remember seeing was in the news media about him escaping from the jail.

Q: What about before that? What can you remember about either media coverage or talk on base?

A: About the little girl, where they were. And, then, they found him in—up north and brought him back. And then, the escape; and I was talking to somebody on base about how he escaped.

Q: Who were you talking to, do you remember?

A: The guy's name was Jim Martin. He works in Air Base Group.

Q: Does he have anything to do with the Security Police?

A: No, he was just talking to somebody in Security Police about the case; that's all.

Q: What did you hear about how he escaped?

A: That he overpowered the guard and got out from the compound; jumped the fence; stole a van; that the van was left, I believe, by Pass Road; and he jumped the gate on Pass Road. And in the news media where they caught him in a police chase. I saw the damage to the cars and that's about it. That's what I remember.

Q: All right. so, you heard on the news that there was a kidnapping?

A: And taking the little girl, yes, sir.

Q: Anything else that you can remember that you haven't already told me?

A: Not that I can remember, no, sir.

Q: Did the media coverage and your discussion with this gentleman cause you to form an opinion as to whether the accused had actually committed the offenses of which the press, the media coverage was about?

A: Whether he actually did it?

Q: Yes.

A: If you're asking me if I thought he was guilty, I think I'd have to say yes on that.

Q: Okay. Did it cause you to have any personal animosity towards the accused?

A: No, sir, not that I can remember.

Q: Did it cause you to form an opinion as to an appropriate kind or amount of punishment that should be imposed?

A: Oh, no, sir.

Q: Now, as I told you before, we're going to hear evidence as to what the facts and circumstances surrounding these offenses—what actually occurred. Can you law [sic] aside any of the information that you heard before and reach a decision on sentence solely based on the information that you will be provided in this court?

A: Yes, sir, I believe I can.

* * *

Questions by Trial Counsel:

Q: Major Mcduffie, you wort of generically referred to the media as a source of much of this information back in April. Were you learning of this from the newspapers, from television, from radio? Do you recall where you learned of the facts?

A: I read about some of it in the paper and I saw some of it on TV and, of course, on the radio when I was driving to work.

Q: On the 27th of April, do you recall receiving a letter from Major General Harvey directing you to avoid that kind of exposure?

A: Yes, I do.

Q: Since that time, have you heard, seen, or read anything about either the accused or the facts of the case?

A: The only thing I remember was—of course, being single, you know, I do get the morning paper. I tried to see what the headlines is and I saw something on his name, I think, last Thursday; and I just said throw that side away.

Q: Did you read anything other than the accused's name before disregarding the paper?

A: No. No.

Q: Was that the local paper, the Sun Herald?

A: Yes, it was.

Q: You also mentioned having had a conversation with someone who works for the Air Base Group and I didn't quite understand who that was.

A: Jim Martin.

Q: Is that a military member?

A: No, he's a civilian. He's a resource manager and works in the Air Base Group Command Section.

Q: What was your understanding as to the source of the information Jim Martin was giving to you?

A: He had talked to—I'm going to mispronounce his name—Captain Ammerman, the Security Police Ops Officer. He said he got his information from him. Jim Martin—Jim came down to the office to work on a project and we got to talking about it.

Q: What's your association with Mister Martin?

A. Just work; not coworkers. I work in Manpower. We were just working a special project and he came down to the building that day and we just started talking.

Q: The judge explained to you a little bit earlier about the importance of your continuing to do what you have been doing and that is to avoid even inadvertent exposure to some media coverage of the facts of the case or facts related to this accused. Particularly since you are single, do you believe you are going to have any trouble in being able to carry out that order of the court?

A: No, I've already decided that, if I am a court member or on the panel, then I'll just ignore the paper and I don't watch news hardly any anyway.

Q: You mentioned to the judge that, at least when you first started to learn of these accounts as they were reported, it caused you to believe that the accused had, in fact, committed the acts that you were reading about. Do you believe, even having felt that way when you first read the accounts, that you can adjudge a punishment based solely on the evidence that comes before you in this courtroom and not stories that you read in the past that may or may not be accurate?

A: Yes, I think I can.

Q: Would you agree that there is a possibility that some of what you read or some of what you heard, even from Mister Martin, is not accurate?

A: If it's not accurate, then won't that come out here?

Q: That's what I'm asking you. Will you adjudge a punishment based upon facts that are presented before you and not what you assume to be facts that you learned from the media or a coworker?

A: Yes, I will.

* * *

MJ: . . . [W]hat happens if something that you may have heard is not covered in any way by what you hear here in court?

MEMBER (Maj McDuffie): In what way, sir?

MJ: Well, for instance, say you recall hearing an item in the news or in talking to someone that we don't cover in any way in the evidence that's presented in here in court, how are you going to – what are you going to do with that information?

MEMBER (Maj McDuffie): Sir, I don't really know how to answer that question because I've tried to block everything out on this case.

MJ: If it comes to mind?

MEMBER (Maj McDuffie): Then I would be allowed to ask a question, right?

MJ: Well, if it comes to mind, can you put it out of your mind?

MEMBER (Maj McDuffie): Oh, yes, sir. I will try to do that.

MJ: At least disregard it in adjudging a sentence?

MEMBER (Maj McDuffie): Yes, sir.

MJ: Captain Miller.

Questions by Defense Counsel:

Q: When you were describing for His Honor what you had heard, I believe I heard you mention something about 'up north.' What were you talking about?

A: I think they went up north – I think it was in Virginia and stayed up there where they found the little girl, just what I saw on the news or read in the paper. That was about it. I mean, that's up north to me because I am in Mississippi.

Q: Right. Anything else about up that way?

A: No, no.

Q: We also got a copy of the biographical information. It mentions here that you have sat on six courts-martial and were removed from four. Was that because there was a judge alone trial so there was no court panel?

A: No. The first three courts-martial I was removed from were when I first came into the Air Force, stationed at Charleston, South Carolina; and I was in charge of Quality Force separating three individuals; and instead of separation, they went to trial; and there was a female; and I was the senior ranking female in Charleston; so, they wanted a female on the panel. And, so, since I knew the whole case, I guess—

Q: They disqualified you?

A: They did; they disqualified me on that one. The other one, it was out in Utah, I think in '86 or '87, I have no idea why I was eliminated from that one.

Q: How long have you known Mister Martin?

A: October, I'll be on base two years; so, it's 18 months, 12 months, basically.

Q: Is he a pretty reputable guy?

A: I guess, yes. I don't deal with him on a day-to-day basis; just whenever I'm working an issue with Air Base Group.

Q: Do you know of a Captain Ammerman?

A: (Affirmative nod.)

Q: Where does he work?

A: I don't know where he works now, but he used to be working in the Security Police squadron.

DC: Thank you much, ma'am.

Appellant urges that Lieutenant Colonel Jasper and Major McDuffie were not impartial court members. Both had been exposed to extensive pretrial coverage of the case, and both expressed a prejudgment of appellant. Appellant argues the very fact that the members had been exposed to outside information raises the possibility that they would consider highly prejudicial and inadmissible evidence. Even though the court-martial was seated for sentencing only, he focuses on Major McDuffie, alleging that she believed from the media coverage that appellant was guilty of the reported offenses and this created a potential spillover to sentencing. Major McDuffie did state that she could set aside this opinion of guilt and render an appropriate sentence based solely upon the evidence.

The Constitution, the Uniform Code of Military Justice, and the Manual for Courts-Martial provide that appellant is entitled to court members who will keep an open mind and arrive at an appropriate sentence based on the evidence and the instructions form the judge. *United States v. Reynolds*, 23 MJ 292 (CMA 1987). The Manual, like the Federal statute—28 USC § 1865(b)—sets forth various grounds for challenge. The specific ground relied upon in this case is RCM 912(f)(1)(N), Manual for Courts-Martial, United States, 1984, which requires excusing a member "whenever it appears that the member . . . . [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."

This is the fourth case this Term dealing with challenges for cause. *See United States v. Lake*, 36 MJ 317 (CMA 1993); *United States v. White*, 36 MJ 284 (CMA 1993); *United States v. Bannwarth*, 36 MJ 265 (CMA 1993). As this Court said in *White* "A trial court's standard is to grant challenges for cause liberally" and this Court "will

not overturn the military judge's determination not to grant a challenge except for a clear abuse of discretion in applying the liberal-grant mandate." 36 MJ at 287. Both Lieutenant Colonel Jasper and Major McDuffie indicated that they had not formed an opinion as to an appropriate sentence and could base their views as to any punishment in the case only upon the facts they heard in court. Thus we hold the military judge did not abuse his discretion in denying the challenges for cause.

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX, GIERKE, and WISS concur.

APPENDIX H

UNITED STATES COURT OF MILITARY APPEALS

No. 67,706
CMR No. 28770

UNITED STATES, APPELLEE

v.

ANDREA P. HARVEY, SERGEANT
U.S. AIR FORCE, APPELLANT

Argued January 5, 1993
Decided June 25, 1993

Counsel

For Appellant: *Major Mary C. Yastishock* (argued); *Colonel Jeffrey R. Owens* and *Major Marilyn A. Gordon* (on brief); *Colonel Terry J. Woodhouse.*

For Appellee: *Captain David Wesley* (argued); *Lieutenant Colonel Brenda J. Hollis* and *Captain Morris D. Davis* (on brief); *Colonel Richard L. Purdon* and *Lieutenant Colonel Jeffery T. Infelise.*

Military Judge: JAMES A. YOUNG, III

Opinion of the Court

CRAWFORD, Judge

Appellant was convicted, contrary to her pleas, of wrongfully using and distributing cocaine and wrongfully

endeavoring to impede an investigation, in violation of Articles 112a and 134, Uniform Code of Military Justice, 10 USC §§ 912a and 934, respectively. The convening authority approved her sentence of a dishonorable discharge, confinement for 15 months, total forfeitures, and reduction to the lowest enlisted grade. The Court of Military Review affirmed. 33 MJ 822 (1991).

We granted review of the following issue:

> WHETHER THE MILITARY JUDGE DENIED APPELLANT MILITARY DUE PROCESS WHEN HE FAILED TO SUPPRESS APPELLANT'S STATEMENTS TO A GOVERNMENT AGENT WHO DELIBERATELY, REPEATEDLY, AND SYSTEMATICALLY REINITIATED A SERIES OF INTERROGATIONS, WITHOUT APPELLANT'S COUNSEL BEING PRESENT, AFTER APPELLANT REQUESTED AND CONSULTED COUNSEL FOLLOWING AN AFOSI INTERROGATION.

This issue was further refined before this Court by appellant in her briefs and oral argument as violations of her Sixth Amendment right to counsel; her Fifth Amendment rights, including the right to counsel and the right against self-incrimination; *Miranda v. Arizona*, 384 U.S. 436 (1966); and Article 31(b), UCMJ, 10 USC § 831(b).

FACTS

On January 20, 1990, Airman Lorne Lopez was interviewed by Office of Special Investigations (OSI) agents about his testing positive for cocaine. After being advised of his rights, Airman Lopez admitted to using cocaine on December 22, 1989, and said that his source of the cocaine was Airman Jennifer O'Brien. The following day Airman O'Brien was interviewed and said that she purchased this

cocaine earlier from appellant, her supervisor. Airman O'Brien also stated that she had used cocaine with appellant several times and appellant has assisted her in purchasing cocaine. On the same day OSI agents interviewed appellant, who invoked her right to counsel after appropriate warnings. On February 1, 1990, appellant telephoned Airman O'Brien several times asking to meet. Airman O'Brien reported these conversations to her first sergeant. The first sergeant notified the OSI, and after getting clearance from O'Brien's defense counsel, the base staff judge advocate, and OSI district headquarters, they agreed to wire O'Brien with a hidden transmitter for her meeting with appellant. The first meeting occurred that afternoon near the gymnasium, but the transmitter malfunctioned. During the meeting O'Brien did not mention drugs. On February 2, 1990, appellant again telephoned O'Brien and arranged for a noon meeting. Airman O'Brien was again equipped with a recorder and transmitter. She was instructed not to broach the subject of drugs unless it was initiated by appellant. O'Brien told appellant that Airman Lopez had tested positive for cocaine on a urinalysis test and had told the OSI he had used cocaine with O'Brien. Another meeting was set up the same day at which time Airman O'Brien admitted implicating appellant to the OSI. Appellant then attempted to convince Airman O'Brien to retract her earlier statement to the OSI and to say that she lied about appellant's involvement.

THE SIXTH AMENDMENT RIGHT TO COUNSEL

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to the assistance of counsel for his defense." In *Kirby v. Illinois*, 406 U.S. 682, 689 (1972), the Supreme Court indicated

that an individual is not entitled to a lawyer at a lineup until the "initiation of adversary judicial criminal proceedings." While Chief Justice Burger seemed to indicate this initiation occurs only when formal charges have been made against the defendant, Justice Stewart's plurality opinion suggests that this right accrues at the time of a "formal charge, preliminary hearing, indictment, information, or arraignment." *Compare* 406 U.S. at 691 *with* 406 U.S. at 689. Likewise, in *United States v. Wattenbarger*, 21 MJ 41, 43 (CMA 1985), *cert. denied*, 477 U.S. 904 (1986), Judge Cox for the majority set forth the general proposition: "In the military, this Sixth-Amendment right to counsel does not attach until preferral of charges." Because of the unique procedural rules in the military, *e.g.*, psychiatric examinations and pretrial confinement (*cf. United States v. Jordan*, 35 MJ 856 (NMCMR), *returned for further consideration*, 36 MJ 381 (CMA 1992)), we will examine *Massiah v. United States*, 377 U.S. 201 (1964), and its progeny to determine when the Sixth Amendment right attaches. *See also* Mil.R.Evid. 305(c),(d), and (e), Manual for Court-Martial, United States, 1984.

In *Massiah v. United States, supra*, defendant was indicted for federal drug charges, retained counsel, pleaded not guilty, and was released on bail. Unbeknownst to Massiah, an indicted co-conspirator agreed to cooperate with the Government. The co-conspirator had a radio transmitter in his car and invited Massiah to discuss the pending case. During this conversation Massiah made damaging admissions which were overheard by federal agents who later testified at Massiah's trial. The Court indicated that "secret interrogation of the defendant . . . after . . . indictment" was outlawed. 377 U.S. at 205.

Brewer v. Williams, 430 U.S. 387, 398 (1977), stated: "[T]he right to counsel granted by the Sixth and Four-

teenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' "

While the investigation in this case had focused on appellant, focus by itself does not ripen into a Sixth Amendment right to counsel. *Hoffa v. United States,* 385 U.S. 293 (1966). We hold that under the facts of this case there was no violation of appellant's Sixth Amendment right to counsel because charges had not been preferred against her. This does not mean the Government has carte blanche as to the use of informers. In *United States v. Henry,* 447 U.S. 264 (1980), the Supreme Court held that a post-indictment statement obtained from a jailed defendant by an informer in the same cellblock violated *Massiah. See also Maine v. Moulton,* 474 U.S. 159 (1985). But *Massiah* is not violated where the informer merely listens and does not question the defendant. *Kuhlmann v. Wilson,* 477 U.S. 436 (1986).

FIFTH AMENDMENT RIGHT TO COUNSEL

Next appellant alleges that a violation of the Self-Incrimination Clause as set forth in *Miranda v. Arizona,* 384 U.S. 436 (1966), and a violation of the right to counsel as set forth in *Edwards v. Arizona,* 451 U.S. 477 (1981), and its progeny occurred. In both *Miranda* and *Edwards,* a custodial interrogation is necessary to prove a violation. *Miranda* defines custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. Here, the conversations were initiated by appellant herself. She was not deprived in any way of her freedom of

movement; indeed, the conversations took place at sites appellant selected. For these reasons we conclude that there was no violation of *Edwards* or *Miranda*.

Under different circumstances where there is custodial interrogation along with invocation of the right to remain silent and the right to counsel, this cautionary observation from *Illinois v. Perkins*, 496 U.S. 292, 300 n.* (1990) (Brennan, J., concurring in the judgment), is important:

> Nothing in the Court's opinion suggests that, had [the accused] previously invoked his Fifth Amendment right to counsel or right to silence, his statements would be admissible. If [he] had invoked either right, the inquiry would focus on whether he subsequently waived the particular right. As the Court made clear in *Moran v. Burbine*, 475 U.S. 412, . . . (1986), the waiver of *Miranda* rights "must [be] voluntary in the sense that it [must be] the product of a free and deliberate choice rather than *intimidation, coercion or deception.*" (Emphasis added.) Since [the accused] was in custody on an unrelated charge when he was questioned, he may be able to challenge the admission of these statements if he previously had invoked his *Miranda* rights with respect to that charge. Similarly, if [he] had been formally charged on the unrelated charge and had invoked his Sixth Amendment right to counsel, he may have a Sixth Amendment challenge to the admissibility of these statements.

(Citations omitted.)

ARTICLE 31

Article 31(b) provides:

> No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without

> first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

Article 31(b) applies when a "person subject to this chapter [the Uniform Code of Military Justice] . . . interrogate[s], or request[s] any statement from, an accused or a person suspected of an offense." Article 31(b) must not be read literally. According to *United States v. Fisher*, 21 USCMA 223, 225, 44 CMR 277, 279 (1972):

> A medical doctor who questions an individual solely to obtain information upon which to predicate a diagnosis, so that he can prescribe appropriate medical treatment or care for the individual, is not performing an investigative or disciplinary function; neither is he engaged in perfecting a criminal case against the individual. His questioning of the accused is not, therefore, within the reach of Article 31.

See United States v. Pittman, 36 MJ 404 (CMA 1993) (Article 31(b) held not applicable to noncommissioned officer who was escorting the accused and asked questions based on personal curiosity); *United States v. Loukas*, 29 MJ 385 (CMA 1990).

Our cases have set forth the rationale for Article 31(b) as follows:

> Careful consideration of the history of the requirement of warning, compels a conclusion that its purpose is to avoid impairment of the constitutional guarantee against compulsory self incrimination. Because of the effect of superior rank or official position upon one subject to

> military law, the mere asking of a question under certain circumstances is the equivalent of a command.

United States v. Gibson, 3 USCMA 746, 752, 14 CMR 164, 170 (1954). We further explained in a later case:

> Conditioned to obey, a serviceperson asked for a statement about an offense may feel himself to be under a special obligation to make such a statement. Moreover, he may be especially amenable to saying what he thinks his military superior wants him to say—whether it is true or not, Thus, the serviceperson needs the reminder required under Article 31 to the effect that he need not be a witness against himself.

United States v. Armstrong, 9 MJ 374, 378 (CMA 1980).

Applying this rationale, this Court stated in *United States v. Duga*, 10 MJ 206, 210 (CMA 1981);

> [T]he Article applies only to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry. Accordingly, in each case it is necessary to determine whether (1) a questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation. Unless both prerequisites are met, Article 31(b) does not apply.

(Citations omitted.)

In *Gibson* the Court held that Article 31(b) did not apply when a fellow prisoner questioned Gibson in pretrial confinement. The Court indicated that such questioning was not calculated to result in untrue statements. 3 USCMA at 753, 14 CMR at 171. In this case O'Brien was subject to the Code and was acting as an agent of the OSI.

But both meetings were requested and arranged by appellant who was O'Brien's supervisor and would not have been perceived as an inquiry by an individual acting in an official capacity or as a law enforcement official to obtain a confession from a suspect. As in *Gibson* this questioning created neither a coercive atmosphere nor an atmosphere where appellant thought she was required to cooperate. *See also United States v. Kirby*, 8 MJ 8 (CMA 1979).

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX, GIERKE, and WISS concur.

APPENDIX I

UNITED STATES COURT OF MILITARY APPEALS

No. 67,692
CMR No. S28381

UNITED STATES, APPELLEE

v.

BARBARA J. TETERS, AIRMAN FIRST CLASS
U.S. AIR FORCE, APPELLANT

Argued December 2, 1992
Decided August 12, 1993

Counsel

For Appellant: *Captain Robert I. Smith* (argued); *Colonel Jeffrey R. Owens* and *Major Alice M. Kottmyer* (on brief); *Colonel Terry J. Woodhouse.*

For Appellee: *Captain Thomas E. Wand* (argued); *Lieutenant Colonel Brenda J. Hollis* and *Major Paul H. Blackwell, Jr.* (on brief); *Lieutenant Colonel Jeffery T. Infelise.*

Military Judge: MARK A. BREIDENBACH

Opinion of the Court

SULLIVAN, Chief Judge:

Appellant was tried by a special court-martial at Sheppard Air Force Base, Texas, on June 20, 1990. She pleaded

guilty to a charge of larceny (4 specifications) and forgery (2 specifications), in violation of Articles 121 and 123, Uniform Code of Military Justice, 10 USC §§ 921 and 923, respectively. The military judge sentenced her to a bad-conduct discharge, confinement and forfeiture of $400 pay per month for 3 months, and reduction to E-1. The convening authority approved this sentence on August 31, 1990. The Court of Military Review affirmed the approved findings and sentence on November 22, 1991, in an unpublished opinion.

On April 20, 1992, this Court granted review of the following issue:

> WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED WHEN IT RULED THAT SPECIFICATIONS 3 AND 4 OF CHARGE I, LARCENY OF MONEY BY USING FORGED CHECKS, WERE NOT MULTIPLICIOUS FOR FINDINGS WITH SPECIFICATIONS 1 AND 2 OF CHARGE II, FORGERY OF THE SAME CHECKS.

We hold that the Court of Military Review did not err when it found that appellant's convictions for forgery and larceny were not multiplicious for findings. *See Schmuck v. United States*, 489 U.S. 705 (1989); *White v. United States*, 582 A.2d 774, 778-79 (D.C. 1990). *See also Byrd v. United States*, 598 A.2d 386, 388-91 (D.C. 1991). *See generally United States v. Dixon*, 61 U.S.L.W. 4835 (U.S. June 28, 1993)(No. 91-1231).

Appellant was charged, *inter alia*, with the following offenses:

> CHARGE: I Violation of the UCMJ, Article 121
>
> * * *
>
> Specification 3: In that [appellant] did, at or near Sheppard Air Force Base, Texas, while on active

duty, *on or about 12 March 1990, steal United States currency, of a value of about $300.00,* the property of the Union Square Federal Credit Union.

Specification 4: In that [appellant] did, at or near Sheppard Air Force Base Texas, while on active duty, *between on or about 9 April 1990 and on or about 12 April 1990, steal* United States currency, or a value of about $200.00, the property of the Union Square Federal Credit Union.

CHARGE II: Violation of the UCMJ, Article 123

Specification 1: In that [appellant] did, at or near Sheppard Air Force Base, Texas, while on active duty, *on or about 12 March 1990, with intent to defraud, falsely make the signature of SSgt Shirley Jean Board to a certain check* in the following words, to wit: Shirley J. Board, which said writing would, if genuine, apparently operate to the legal harm of another.

Specification 2: In that [appellant] did, at or near Sheppard Air Force Base, Texas, while on active duty, *between on or about 9 April 1990 and on or about 12 April 1990, with intent to defraud, falsely make the signature of A1C Beverly Patricia Moncur to a certain check* in the following words, to wit: Beverly P. Moncur, which said writing would, if genuine, apparently operate to the legal harm of another.

(Emphasis added.)

Prior to entering his pleas counsel made several motions concerning these charges and specifications:

DC: At this time, your honor, the defense has two motions, the first motion I have marked as Appellate

Exhibit III for identification; that is a motion to make Charge I, Specifications 3 and 4, and Charge II, Specifications 1 and 2 more definite and certain. *Its companion motion which I am making as Appellate Exhibit IV for identification is a motion to find Charge I, Specifications 3 and 4 multiplicious for sentencing purposes with Charge II, Specifications 1 and 2.* The motions have previously been given to the Government on the 16th of June at 1745. Copies have previously been made available to you and I am now tendering those two motions to you. The reason they are companion motions is that it is the defense's understanding that under *U.S. v. Baker,* the Specifications could be found multiplicious if they fairly embraced each other. Appellate courts have held that without a motion to find the specifications more definite and certain that the motion would be fatal at appeal if not raised at this level.

MJ: That is only from the records if there is some ambiguity as to the specifications, isn't that correct?

DC: Yes, sir. I would also like to note for the record that it is my understanding that the Government has no objection to the statement of facts on the motion for multiplicity.

ATC: That is correct, your honor.

DC: And the defense would stand on the motion.

MJ: Would the Government wish to respond at this time?

ATC: Yes, your honor, at this point the Government would present what has been marked as Appellate Exhibit V, which is the brief in response to the defense motion to make more definite and certain, and would

present what has been marked as Appellate Exhibit VI which is the response brief to the motion by the defense as to multiplicity. At this time I tender the appellate exhibits to the military judge. Copies have previously been given to the defense counsel and the military judge.

The prosecution will stand on the motions.

MJ: With regard to the defense motion to make more definite and certain, I find that Specifications 1 and 2 of Charge II identify only one check involved in each Specification. The date in Specification 3 of Charge I is directly related to the date in Specification 1 of Charge II. The dates in Specification 4 of Charge I also match the dates alleged in Specification 2 of Charge II. The particular individuals who are involved are named in each Specification. Each Specification sets forth a clear and concise statement of the essential facts constituting the offense. Each Specification is sufficiently specific in informing the accused of the conduct charged. The Specifications are not misleading. They are also sufficiently specific to protect the accused from double jeopardy.

The defense motion is denied.

The ruling on the defense motion with regard to multiplicity, I will defer until just before entering findings.

(Emphasis added.)

Later, defense counsel again moved for appropriate relief because "Charge I, specifications 3 & 4 [were] multiplicious with Charge II, specifications 1 & 2 for both findings and sentencing purposes." The military judge found that the offenses were not multiplicious for findings

but were multiplicious for sentencing. He ruled that these specifications "have separate elements and require different proof. Neither is a lesser included offense of the other. The forgery offenses were completed once the making with intent to defraud was accomplished."

Appellant argues that the specifications of forgery under Article 123 are multiplicious for finding purposes [1] with those for larceny under Article 121. *See United States v. Baker*, 14 MJ 361, 367-68 (CMA 1983). *See also Ball v. United States*, 470 U.S. 856 (1985). He premises his argument on the decision of this Court in *United States v. Johnson*, 26 MJ 415, 419 (CMA 1988), and its utilization of a "means" test for determining multiplicity for findings. Appellant defines this test as follows: "[W]here the offenses are part of what is substantially one transaction, and the individual acts which constitute the basis for dif-

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[1] The word "multiplicity" and the principles of law which it incorporates are not unique to military law. *See United States v. Universal C.I.T. Credit Corp*, 344 U.S. 218, 224 (1952). In Federal civilian courts " '[m]ultiplicity' is the charging of a single offense in several counts." *See* Wright, 1 Federal Practice and Procedure: Criminal 2d § 142 at 469 (1982). Wright further notes:

> The vice of multiplicity is that it may lead to multiple sentences for the same offense, though for this there are remedies, and that "the prolix pleading may have some psychological effect upon a jury by suggesting to it that defendant has committed not one but several crimes.

Id. at 475-76.

See generally 8 Moore's Federal Practice ¶ 8.07 (2d ed. 1993). He also notes the decision of the Supreme Court in *Ball v. United States*, 470 U.S. 856 (1985), and its holding concerning multiple convictions. *See United States v. Burns*, 990 F.2d 1426, 1438-39 (4th Cir. 1993). This three-step analysis of multiplicity in terms of charging, findings and sentence was similarly recognized the decision of this Court in *United States v. Baker*, 14 MJ 361 (CMA 1983). *See generally United States v. Dixon*, 921 F.2d 194, 196 (8th Cir. 1990).

ferent offenses were merely the means for effecting the ultimate offense, the individual charges or specifications cannot stand together." Final Brief at 4. He then avers that the facts of record in this case show that the forgery offenses were committed solely for the purpose of effectuating the larcenies and, therefore, only the larceny convictions can stand.

At the outset, we note that the constitutional power to define federal civilian crimes and their punishments resides with the Congress of the United States. *See generally Whalen v. United States*, 445 U.S. 684, 689 (1980). A similar constitutional power to define Federal military offenses and prescribe their punishments also lies with Congress. *Solorio v. United States*, 483 U.S. 435, 438 (1987). *See United States v. Baker*, *supra* at 368 n.5. This power, of course, is limited by the Fifth Amendment prohibition against Double Jeopardy, although this limitation was once thought greater if the offenses were not prosecuted at a single trial but rather at successive trials. *Compare United States v. Dixon*, 61 U.S.L.W. 4835, *with Grady v. Corbin*, 495 U.S. 508, 516-18 (1990), which *Dixon* overruled. *See generally North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). In either event, a constitutional violation under the Double Jeopardy Clause of the Constitution now occurs only if a court, *contrary to the intent of Congress*, imposes multiple convictions and punishments under different statutes for the same act or course of conduct. *See Ball v. United States*, *supra* at 861; *Albernaz v. United States*, 450 U.S. 333, 343-44 (1981).

Thus, the Double Jeopardy question raised in this case is whether Congress intended appellant at a single court-martial to be convicted of both forgery under Article 123 and larceny under Article 121. As noted earlier, however, appellant relies exclusively on the decision of this Court in *United States v. Johnson*, *supra*, and the so-called

"means" test of multiplicity. In that case, this Court confronted a similar situation involving offenses of malingering under Article 115, UCMJ, 10 USC § 915, and possession and use of heroin under Article 134, UCMJ, 10 USC § 934. There, the pleadings of the malingering offense expressly alleged the drug offenses as the means for accomplishing the malingering and the proof of the malingering offense established that as fact. Then-Chief Judge Everett writing for a majority of this Court set aside the drug-offense convictions on grounds of multiplicity. The Court concluded that the drug specifications were "fairly embraced" in the malingering specifications under the military law of lesser-included offenses. *See, United States v. Holt,* 16 MJ 393 (CMA 1983); *United States v. Baker, supra* at 368; *see also United States v. Duggan,* 4 USCMA 396, 400, 15 CMR 396, 400 (1954).

An initial question raised in this context is whether our decision in *United States v. Johnson, supra,* is based on the Double Jeopardy Clause of the Fifth Amendment. If it is not so based, then the precise strictures of Supreme Court case law on Double Jeopardy (*i.e.,* the Rule of *Blockburger v. United States,* 284 U.S. 299, 304 (1932)) may not apply to it. As noted above, *United States v. Johnson, supra,* relied on the "fairly embraced" doctrine of lesser-included offenses of *United States v. Baker, supra* at 368. It in turn construed Article 79, UCMJ, 10 USC § 879, in accordance with precedent of this Court, to require lesser-included offenses to be determined on the basis of the pleadings and proof of the greater offense. It also relied on precedent of this Court to authorize dismissal of lesser-included offenses so established. In sum, *United States v. Johnson, supra,* is based on the military definition of lesser-included offenses and the doctrine of merger. *See Hall v. United States,* 343 A.2d 35, 38-39 (D.C. 1975).

More particularly, the "fairly embraced" test of *United States v. Baker, supra* at 368, was not predicated on the decision of the Supreme Court in *Blockburger v. United States, supra.*[2] *See United States v. Jones,* 23 MJ 301, 303

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[2] The "fairly embraced" test focuses on the pleadings and proof of the greater offense to determine whether a second offense is a lesser-included offense as a matter of military law. Support for this approach is found in the legislative history of the Uniform Code of Military Justice, as follows:

> ART. 59. Error of law; lesser included offense.
>
> * * *
>
> (b) Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense.
>
> * * *
>
> Subdivision (b) is taken from A. W. 47(f), 49(a) and article 39(d), (e) of the proposed A. G. N. MCM paragraph 78(c) defines a lesser included offense as follows:
>
> > *The test as to whether an offense found is necessarily included in that charged is that it is included only if it is necessary in proving the offense charged to prove all the elements of the offense found.*
>
> Mr. Brooks. That subsection (b) means that if a man is tried for murder, and they find an error committed, the appellate court could still hold him or find him guilty of manslaughter?
>
> Mr. Larkin. That is right.
>
> * * *
>
> Mr. Philbin. . . . How about subsection (b), what is your reasoning on that?
>
> Mr. Larkin. Well, that is to give the reviewing authorities latitude in the review of a case where a man has been charged with let us say murder and he has been found guilty of it but the reviewing authority finds that one element of the crime of murder has not been proved but without that element a lesser included offense has been proved.
>
> And while we do not in our punitive articles have degrees of crime in the sense of grand larceny in the first or second degree

(CMA 1987). Admittedly, at one time it was an open question to some courts and scholars whether the *Blockburger* Rule could be applied to the pleadings and proof at trial. *See United States v. Zubko*, 18 MJ 378, 382-83 n.6 (1984); *Edwards v. United States*, 583 A.2d 661, 669 (D.C. App. 1990). *See generally* Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 Am.Crim.L.Rev. 445, 457-58 (Spring 1984). Moreover, the earlier decisions of this Court espoused a factual approach to *Blockburger*.[3]

> as you find in civil courts, the idea is analogous. For instance, in a grand larceny in the first degree charge, assuming you had one where one of the elements was that property exceeding $500 in value was taken and the man is convicted of it and the reviewing authority feels they made an error in the value and it was only $250 and they would be perfectly satisfied he was guilty of grand larceny in the second degree and not in the first, they could reduce the finding to a lesser included offense, just as the court can itself when it tries the case and finds the man guilty of a lesser included offense than the one he is charged with.
>
> This extends that authority to the reviewing authorities, because several of them have a review of the facts as we will see.

Hearings on H.R. 2498 before a Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess. [hereafter Hearings] 1174-75 (1949), *reprinted in* Index and Legislative History, Uniform Code of Military Justice (1950) (emphasis added).

The drafters of the Uniform Code did not reference the decision of the Supreme Court in *Blockburger v. United States*, 284 U.S. 299 (1932), or utilize the so-called *Blockburger* statutory-elements language. Moreover, the cited Manual provision speaks in terms of the pleadings and proof. *See also* Harrington, *Multiplicity in the Military*, 134 Mil.L.Rev. 45, 84-85 (1991).

[3] In *United States v. Baker*, 14 MJ 361, 367-68 (CMA 1983), this Court cited *United States v. Duggan*, 4 USCMA 396, 399-400, 15 CMR 396, 399-400 (1954), as authority for the "fairly embraced" test of lesser included offenses in military law. In *Duggan* this Court stated:

> Accordingly, we must look to the allegations of the specification, and proof in support thereof, in each case to determine whether a

However, the Court in *United States v. Baker, supra,* did not adopt this view, which was later definitively rejected by the Supreme Court in *Grady v. Corbin, supra* at 521 n. 12. *See generally United States v. Dixon, supra* at 4837. *Cf. Byrd v. United States,* 598 A.2d 386, 390 (D.C. App. 1991).[4]

The "fairly embraced" test of *United States v. Baker, supra,* instead, was expressly based on the doctrine of lesser-included offenses as provided in Article 79. *Id.* at 367, citing *United States v. Stegall,* 6 MJ 176, 178 (CMA 1979). A component of this doctrine is the concept or principle of merger which permits lesser-included offenses (even those determined to be lesser-included offenses on

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lesser offense is placed in issue. While the standards we have adopted in considering whether one offense is included in another may be more generous than those prescribed by other courts, in an unbroken line of decisions we have made the test turn on both the charge and evidence.

4 USCMA at 399, 15 CMR at 399. Moreover, in *United States v. Beene,* 4 USCMA 177, 178, 15 CMR 177, 178 (1954), this Court expressly acknowledged in the multiple-convictions context that our approach to lesser-included offenses went beyond the strict elemental approach of *Blockburger v. United States,* 284 U.S. 299 (1932); *see United States v. Redenius,* 4 USCMA 161, 166-67, 15 CMR 161, 166-67 (1954).

[4] It must be remembered that at the time *United States v. Baker,* 14 MJ 361 (CMA 1983), was decided, the Supreme Court had applied the *Blockburger* Rule only to the multiple-punishments questions. *See Ball v. United States,* 470 U.S. 856 (1985). Accordingly, this Court, like the District of Columbia Court of Appeals (*see Hall v. United States,* 343 A.2d 35, 38-39 (1975)), did not consider itself bound by the *Blockburger* test in determining congressional intent on this related, but nonetheless distinct, question of multiple convictions. *See United States v. Parker,* 3 USCMA 541, 546-47, 13 CMR 97, 102-03 (1953); *United States v. Parker,* 3 USCMA 541, 546-47, 13 CMR 97, 102-03 (1953); *United States v. Davis,* 2 USCMA 505, 508-09, 10 CMR 3, 6-7 (1953).

the basis of the pleadings and proof) to be subsumed into the greater offense for purposes of findings. *See Hall v. United States*, 343 A.2d 35, 38 and 39 (D.C. 1975). The legal authority for dismissing such multiplicious findings can be traced to the decision of this Court in *United States v. Drexler*, 9 USCMA 405, 408, 26 CMR 185, 188 (1958). It in turn rested on a similar power to dismiss multiplicious counts found in Federal criminal courts (*see United States v. Univeral C.I.T. Credit Corp.*, 344 U.S. 218 (1952)) and the general power of an appellate court to correct errors and insure justice. 9 USCMA at 408, 26 CMR at 188. *See generally Fuller v. United States*, 407 F.2d 1199, 1233 n.52 (D.C. Cir. 1968)(en banc), *cert. denied*, 393 U.S. 1120 (1969).

In this regard, we note that the language of Article 79 is identical to the language of Fed.R.Crim.P. 31(c).[5] We have consistently construed this statute and its "necessarily included" language to mean offenses which are included in the pleadings and proof of the greater offense. *See United States v. Baker, supra* and cases cited therein. The Court of Appeals for the District of Columbia Circuit in *United States v. Whitaker*, 447 F.2d 314, 318-19 (D.C. Cir. 1971),

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[5] § 879. Art. 79. **Conviction of lesser included offense**

An accused may by found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein.

Fed.R.Crim.P. 31(c) states:

(c) **Conviction of Less Offense.** The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

The legislative history of Article 79 indicates that the military statute was patterned on the Federal rule. Hearings, *supra* at 1224, *reprinted in* Index and Legislative History, Uniform Code of Military Justice (1950).

similarly construed Fed.R.Crim.P. 31(c) to permit determination of lesser-included offenses on the basis of the proof of the greater offense. *See also Hall v. United States*, 343a.2d at 38-39. Nevertheless, in 1989, the Supreme Court, although, acknowledging divergent views by the Circuits on the scope of this Federal rule, definitively held that Fed.R.Crim.P. 31(c) should be construed to include only lesser-included offenses as established by their statutory elements. *Schmuck v. United States, supra* at 716. In view of the identity of language of Article 79 and Fed.R.Crim.P. 31(c), we will apply the Supreme Court's more recent holding and abandon the "fairly embraced" test for determining lesser-included offenses as a matter of military law.

In this light, we have reconsidered our decision in *United States v. Baker, supra,* and now conclude that the time has passed for a separate military-law doctrine to prevent multiplicious specifications. *See United States v. Johnson*, 26 MJ at 420 n.* (Cox, J., concurring in part and dissenting in part). As noted above, under the Supreme Court decision in *Schmuck*, this rule of multiplicity, like the *Blockburger* Rule used in Double Jeopardy cases, would be limited to consideration of the statutory elements of the involved crimes. Moreover, in light of *Ball v. United States, supra,* and its inclusion of multiple convictions within the ambit of the protection of the Double Jeopardy Clause, the interests of justice no longer require such an unorthodox remedy for this vice. Finally, in light of the current practice in Federal courts, the assimilation of this relatively ancient doctrine of merger into the modern law of Double Jeopardy seems long overdue. *See United States v. Cavanaugh*, 948 F.2d 405, 412 n.7 (8th Cir. 1991); *United States v. Belt*, 516 F.2d 873, 874 n.7 (8th Cir. 1975).

Therefore, the question before us is one of Double Jeopardy, and it asks whether Congress intended appellant at a single court-martial to be convicted of both forgery under Article 123 and larceny under Article 121. *See United States v. Dixon, Ball v. United States,* and *Albernaz v. United States,* all *supra, See* ___ MJ at (4, 8, 9). In light of appellant's particular argument before this Court, this question may also be narrowed. We need only decide whether Congress intended that appellant be found guilty of both forgery and larceny at a single court-martial where the pleadings and proof establish that the forgery was the "means" for committing the larceny offense. We hold that Congress had such an intent. *Cf. Whalen v. United States, supra.*

Our initial inquiry in this regard is: How does Congress express its intent concerning multiple convictions at a single trial for different statutory violations arising from the same act or transaction? *See Albernaz v. United States,* 450 U.S. at 340; *see also Bifulco v. United States,* 447 U.S. 381 (1980). *See generally* 2A Sutherland Stat Const § 45.06-48.19 (5th ed. 1992). It could do so expressly in the pertinent statute(s) violated or in their legislative histories. *See Garrett v. United States,* 471 U.S. 773, 778-79 (1985); *Missouri v. Hunter,* 459 U.S. 359, 368-69 (1983). Absent such an overt expression of legislative intent, it can also be presumed or inferred based on the elements of the violated statutes and their relationship to each other. *See United States v. Dixon, supra; Blockburger v. United States,* 284 U.S. at 304. Finally, other recognized guidelines for discerning congressional intent may then be considered to determine whether the above presumption of separateness is overcome by clear indications of a contrary legislative intent. *Ball v. United States,* 470 U.S. at 862-65; *United States v. Woodward,*

469 U.S. 105, 109 (1985); *Missouri v. Hunter*, 459 U.S. at 366-67; *Albernaz v. United States*, 450 U.S. at 340-42; *Whalen v. United States*, 455 U.S. at 693-95. *See also Garrett v. United States*, 471 U.S. 773, 779 (1985).[6]

Turning first to the particular statutes involved in this case, we note that Congress has not expressly provided for multiple convictions and punishments where a forgery is committed as the means of accomplishing a larceny. On the other hand, neither Article 121 nor Article 123 expressly prohibits multiple convictions and punishments in these circumstances. Finally, neither of these statutes articulates a "means" test for deciding these questions in individual cases. As in most situations, the statutes are silent on this matter.

Turning next to the legislative histories of these statutes, we find no mention of the problem of multiple convictions or punishments, or any direction to employ a "means" test. On the other hand, we also find no statements in the legislative histories of these provision prohibiting use of such a test. Again, as in most cases, the legislative history of the violated statute or statutes is silent.

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[6] These cases have also been construed to preclude utilization of the *Blockburger* Rule where Congress has expressly or impliedly indicated its intent on multiple conviction and punishment issues. *See United States v. Martinez-Torres*, 556 F. Supp. 1255, 1266-67 (S.D. NY 1983), *aff'd on other grounds* 722 F.2d 1019 (2d Cir. 1983).

In our view the order of analysis is not outcome determinative. When there is conflict between application of the *Blockburger* Rule and some other rule of construction for determining implied legislative intent, the rule of lenity applies. *Whalen v. United States*, 445 U.S. 684, 694 (1980). Moreover, if Congress has expressly indicated an intent contrary to the *Blockburger* Rule, congressional intent controls. *See Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983).

In these circumstances, the supreme Court has indicated that the rule of construction found in *Blockburger v. United States, supra,* is appropriate to discern congressional intent. That rule is as follows:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

284 U.S. at 304. *See Albernaz v. United States,* 450 U.S. at 341-42. It is now unquestionably established that this test is to be applied to the elements of the statutes violated and not to the pleadings or proof of these offenses. *United States v. Dixon, supra* at 4837; *Brady v. Corbin,* 495 U.S. at 521 n.12. *Cf. Brown v. Ohio, 432 U.S. 161 (1977). See generally Byrd v. United States,* 598 A.2d at 390 n.7.

Turning to the present case, Article 121, prohibiting larceny, requires as an element a wrongful taking, obtaining, or withholding "by any means" of "money, personal property, or article of value." Article 123, prohibiting forgery, does not contain a taking element. Instead, it requires the false making or altering of any signature on any writing which "if genuine, apparently impose[s] a legal liability on another or change[s] his legal right or liability to his prejudice." Article 121 requires no such signature. Thus, the *Blockburger* Rule is clearly satisfied in this case and separate offenses warranting separate convictions and punishment can be presumed to be Congress' intent. *See United States v. McMillian,* 33 MJ 257 (CMA 1991).

Moreover, we do not read the Supreme Court decision in *Whalen v. United States, supra,* as authorizing a congressionally intended exception to the *Blockburger* Rule where such a separate elemental offense is nonetheless evi-

denced as the means of committing the other. 455 U.S. at 694 n.8. There, the Supreme Court found that felony murder and the underlying felony (rape) were not the same offense under a strict elemental application of the *Blockburger* Rule. However, it eschewed this application of the *Blockburger* Rule in the compound-and-predicate-offense situation and concluded that only one punishment was intended by Congress in these circumstances. *See also Jones v. Thomas*, 491 U.S. 376, 381 (1989). This conclusion, however, was not based on the pleadings-and-proof "means" test posited by appellant in this case. Instead, it was based on the statutory elements of the compound-and-predicate offenses and the Supreme Court's doubt as to the suitability of strictly applying the *Blockburger* Rule in this unique statutory context. 445 U.S. at 695 n.10.

The final step to determine constitutionally separate offenses is to determine whether there are any other indications of contrary intent on Congress' part which can overcome the *Blockburger* presumption of separateness. *See Missouri v. Hunter*, 459 U.S. at 366-67. Appellant might argue that Article 79 clearly reflects Congress' intent to reject the *Blockburger* presumption of separateness where pleadings and proof showed one offense was included in another. However, as explained above, our "fairly embraced" approach to Article 79 does not survive the 1989 decision of the Supreme Court in *Schmuck v. United States, supra. See Byrd v. United States*, 598 A.2d at 390 n.9. Since appellant's trial occurred in 1990, he could not rely on Article 79 as a clear expression of congressional intent contrary to the *Blockburger* Rule.

In summary, we hold that appellant has failed to show that Congress expressly provided in Articles 121 and 123 or their legislative histories that multiple convictions are not authorized in this case. In addition, she has failed to

show that application of the *Blockburger* Rule to these statutes presumptively precludes separate convictions for forgery and larceny. Finally, she has failed to establish any indication of a contrary intent on Congress' part to overcome the *Blockburger* presumption that forgery and larceny are separate offenses for purposes of findings. Accordingly, we hold that separate convictions for forgery and larceny are authorized by Congress. *See also White v. United States,* 582A.2d at 779.

The decision of the United States Air Force Court of Military Review is affirmed.

Judges CRAWFORD, GIERKE, and WISS concur.

COX, Judge (concurring):

With apologies to the great bard, I join the Court in burying *United States v. Baker,* 14 MJ 361 (CMA 1983), and its progeny, but not in praising or justifying them. This is not, however, the day to catalog the flaws of those opinions. Rightly does the majority opinion acknowledge that "the constitutional power to define federal civilian crimes and their punishments resides with the Congress of the United States." ____ MJ at *(8)*. And amen!* *United*

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* The majority opinion vindicates the view of Judge Cook in opposing the *Baker* train, with respect to findings. *United States v. Baker,* 14 MJ 361 (CMA 1983). He, at least, believed that *Blockburger v. United States,* 284 U.S. 299, 304 (1932); *American Tobacco Co. v. United States,* 328 U.S. 781, 788 (1946); *Gore v. United States,* 357 U.S. 386, 389 ((1958); *Iannelli v. United States,* 420 U.S. 770, 785 n.17 (1975); *Brown v. Ohio,* 432 U.S. 161, 166 (1977); and *Albernaz v. United States,* 450 U.S. 333, 343 (1981), were the law, and I trust he would have had no difficulty understanding *Ball v. United States,* 470 U.S. 856 (1985), and *Schmuck v. United States,* 489 U.S. 705 (1989). *See e.g., United States v. Baker, supra* at 371 (Cook, J., dissenting); *United States v. Zupancic,* 18 MJ 387, 391 (CMA 1984)(Cook, S.J., concurring in part and dissenting in part).

States v. Wilson, 35 MJ 473, 475 n.3 (CMA 1992); *see also United States v. Boyle*, 36 MJ 326, 328 (CMA 1993)(Crawford, J., concurring in the result).

With *Baker, et al.*, behind us, hopefully the courts and the services, and perhaps even the President or Congress, can now direct some attention to what I consider a legitimate issue, namely the sentencing of servicemembers convicted of multiple offenses. I averted to this problem in my separate opinion in *United States v. Beaudin*, 35 MJ 385, 388-89 (CMA 1992). My point there was not to advocate a system of sentencing guidelines for the military, but to note merely the Sentencing Commission's more rational approach to sentencing in the multiple-offense arena. It is the all-or-nothing, sentence-multiplier consequence of the multiplicity conclusion, primarily, that has fueled this internecine conflict all these years. It would be nice to see the matter rationally resolved at long last.

APPENDIX J

UNITED STATES COURT OF MILITARY APPEALS

No. 68,065
CMR No. 28379

UNITED STATES, APPELLEE

v.

EDWARD W. PERRY, AIRMAN BASIC
U.S. AIR FORCE, APPELLANT

Argued April 8, 1993
Decided Aug. 18, 1993

Counsel

For Appellant: *Captain George F. May* (argued); *Colonel Terry J. Woodhouse* and *Major Mary C. Yastishock* (on brief); *Major Alice M. Kottmyer.*

For Appellee: *Major John H. Kongable* (argued); *Colonel Richard L. Purdon* and *Lieutenant Colonel Jeffery T. Infelise* (on brief); *Major Paul H. Blackwell, Jr.* and *Captain Leonard R. Rippey.*

Military Judge: ROBERT E. SEARS

Opinion of the Court

COX, Judge:

Appellant stands convicted of wrongful use of cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10

USC § 912a[1] Before this Court he challenges admission of evidence that he knew the names of possible drug users as being improper under a guilt-by-association theory.

On Monday, July 24, 1989, following leave, appellant submitted a urine sample as a part of a unit urinalysis. On August 17, he was interviewed by an Office of Special Investigations (OSI) agent, who informed him that his urinalysis results were positive and then asked him to act as an informant. Appellant agreed to work with the OSI. He provided them with names of people he had heard used drugs, and he made contact with those individuals.

At trial, appellant made a motion *in limine* to exclude evidence that he provided the OSI with the names of people who might illegally use drugs and claimed its prejudicial impact outweighed any probative value. The military judge refused to make a ruling at that time.

Appellant later testified and presented an innocent-ingestion defense. Appellant's version of the facts, as stated by the Court of Military Review, is as follows:

> The appellant, while seeing his parents in the Washington, D.C., area, visited a bar in Georgetown in the company of his brother and a friend. As they left the bar the appellant bummed a cigarette (a filtered Newport) from a recently met bar acquaintance. After he smoked the cigarette, the acquaintance asked him how he liked the cigarette as it was a "cool one," i.e., one laced with cocaine. The appellant immediately hit his new acquaintance, and

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[1] On December 12-13, 1989, appellant was tried by general court-martial composed of officer members. Contrary to his pleas, he was convicted of wrongful use of cocaine and sentenced to a bad-conduct discharge, as well as confinement and forfeiture of $200 pay per month for 1 year. The convening authority approved the sentence, and the Court of Military Review affirmed the findings and sentence in an unpublished opinion dated April 16, 1992.

> a fight ensued. The appellant's brother broke up the altercation, and the two returned to their parents' home. The appellant testified he vomited and tried to sleep but was unable to do so until the next afternoon.

Unpub. op. at 1-2.

On cross-examination of appellant, trial counsel raised the issue of appellant's working with the OSI, and defense counsel objected. In a session under Article 39(a), UCMJ, 10 USC § 839(a), trial counsel argued that evidence of appellant's knowledge was relevant to show his general familiarity with cocaine use. The military judge noted that the standard for relevance is a light one and ruled such evidence is relevant to show both appellant's familiarity with cocaine and its general proximity to him.

Appellant proceeded to testify that he worked as an informant for the OSI. When he lived in the dormitory, he heard rumors of people using drugs. He gave the OSI the names of those people and "checked them out for" the OSI. Appellant argues that the prosecution presented this evidence to show "guilty by association" and notes this Court has rejected "the principle of 'guilt by association.' " *United States v. Adkins*, 5 USCMA 492, 499, 18 CMR 116, 123 (1955).

Mil.R.Evid. 402, Manual for Courts-Martial, United States, 1984, provides for admission of relevant evidence. Relevant evidence is that "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mil.R.Evid. 401; *United States v. Elmore*, 33 MJ 387, 397 (CMA 1991). The military judge ruled that evidence showing appellant acted as an informant was relevant to show both familiarity with cocaine as well as its proximity. We, however, disagree. Appellant's knowledge of the identity of possible drug users neither proves nor disproves that, during the time period alleged, he knowingly

used cocaine.[2] Such evidence, which appellant knew through "rumors" he hard while living in the dormitory, hardly makes his drug use at a later time more or less probable. In any event, the relevance is minimal.

Because such evidence has minimal relevance, if any, its "probative value is substantially outweighed by the danger of unfair prejudice" under Mil.R.Evid. 403. The potential for prejudice arises from two implications: (1) guilt due to appellant's willingness to help the OSI and (2) guilt by association. We hold the military judge abused his discretion in admitting evidence which is more unfairly prejudicial than probative. *United States v. Orsburn*, 31 MJ 182, 188 (CMA 1990), *cert. denied*, 498 U.S. 1120, 111 S.Ct. 1074 (1991).

However, we also hold any error was harmless. Art. 59(a), UCMJ, 10 USC § 859(a). Appellant presented an innocent-ingestion defense.

> In rebuttal the prosecution offered the testimony of a forensic chemist who stated that to achieve a 98,000 ng/ml [nanograms per milliliter] level of cocaine metabolites [as appellant's urinalysis indicated] 28 hours after use [which would be consistent with the timing appellant alleged in his defense] would require almost a toxic dose of cocaine. Such a high level of use would entail a serious risk of death due to convulsions, high blood pressure, and hemorrhaging. Additionally, a person taking that much cocaine would appear "very, very sick" to even a casual observer. Further, cocaine mixed with a cigarette

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[2] The Government cites *United States v. Rounds*, 30 MJ 76 (CMA 1990), *cert. denied*, 498 U.S. 846 (1991), and *United States v. Melvin*, 26 MJ 145 (CMA 1988), in its brief. In both cases, this Court concluded evidence of access to drugs was admissible to corroborate a confession under Mil.R.Evid. 304(g), Manual for Courts-Martial, United States, 1984. There is no confession here; the determination of relevance in those cases is inapplicable to the facts of this case.

> "wouldn't work" as the igniting of the tobacco decomposes the cocaine. Finally, since cocaine does not vaporize while mixed with lighted tobacco, it will not pass through a filter cigarette, like a Newport.

Unpub. op. at 2. In light of the overwhelming evidence presented against appellant, admission of evidence he acted as an informant was harmless.

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges CRAWFORD, GIERKE, and WISS concur.

APPENDIX K

UNITED STATES COURT OF MILITARY APPEALS

No. 67,860
CMR No. 27931

UNITED STATES, APPELLEE

v.

JOHN W. PROCTOR, JR., STAFF SERGEANT
U.S. AIR FORCE, APPELLANT

Argued January 6, 1993
Decided Aug. 18, 1993

Counsel

For Appellant: *Captain Robert I. Smith* (argued); *Major Mary C. Yastishock* (on brief); *Colonel Jeffrey R. Owens, Colonel Terry J. Woodhouse, Major Alice M. Kottmyer.*

For Appellee: *Captain Jane M.E. Peterson* (argued); *Colonel Richard L. Purdon* and *Lieutenant Colonel Jeffery T. Infelise* (on brief); *Lieutenant Colonel Brenda J. Hollis.*

Military Judge: JAMES E. HEUPEL

Opinion of the Court

GIERKE, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of multiple sexual offenses and assaults on children under 16 years of age, in violation of Articles 134 and 128, Uniform Code of Military Justice, 10

USC §§ 934 and 928, respectively. The approved sentence provides for a dishonorable discharge, confinement for 30 years, total forfeitures, and reduction to E-1. The Court of Military Review affirmed the findings and sentence. 34 MJ 549 (1992). This Court granted review of the following issue:

> WHETHER THE MILITARY JUDGE ERRED WHEN HE FOUND APPELLANT HAD SUFFICIENT MENTAL CAPACITY TO CONDUCT OR COOPERATE INTELLIGENTS IN THE DEFENSE OF HIS CASE.

Appellant raised the question of his mental capacity at trial and before the Court of Military Review. The military judge found that appellant had sufficient mental capacity to stand trial, and the Court of Military Review affirmed the findings and sentence. We hold that the military judge did not err.

I. Factual Background

Between June 1981 and April 1986, appellant was seen in several Air Force mental health clinics for unspecified reasons. Because his command was concerned about his mental suitability for a security clearance, appellant was sent to the mental health clinic at Kadena Air Base on October 22, 1987. At that time Major Geeze, a psychiatrist, diagnosed appellant as narcissistic with suggestions of delusional thinking. Major Geeze treated appellant until August 1988, at which time Major Geeze determined that there were no psychiatrict "contradictions" to returning appellant's security clearance. On November 16, 1988, appellant was admitted to the Kadena mental health clinic after "contemplating suicide" because of the investigation of the offenses involved in this case. On November 21, 1988, appellant was placed in pretrial confinement.

At the request of appellant's first detailed defense counsel, Captain Coning, a sanity board was convened, consisting of

Major Geeze, a psychologist, and another psychiatrist. On December 13, 1988, the board diagnozed appellant as a pedophile with a narcissistic personality disorder but found him mentally responsible and competent to stand trial.

On January 5, 1989, appellant relieved Captain Coning. Lieuteant Colonel Brown was detailed in Coning's place, and he requested another sanity board. On March 10, 1989, the second sanity board diagnosed appellant as a pedophile suffering from an unspecified personality disorder but found him mentally responsible and competent to stand trial.

Prior to trial appellant rejected a pretrial agreement limiting confinement to 15 years, telling his counsel that God would deliver him from sentencing.

At trial, the military judge had extensive dialogue with appellant on the question of his mental capacity as well as other interlocutory matters. Early in the trial, there had been considerable discussion about whether Captain Tressler, assistant defense counsel, could testify on appellant's behalf without breaching the attorney-client privilege. Appellant requested that Captain Tressler be excused, and requested permission to explain his reasons.

After reading a passage from the Bible, appellant stated:

> When I left here yesterday afternoon I had no idea at all what was going on. I was 98 percent in the lost. And I think the only person in the courtroom that knew less about what was going on in this court-martial was the bailiff. There was a lot of things said, but it was quite confusing. I went back to the Joint Forces Brig last night and I prayed on it, and this morning about 3:00 A.M. I awakened and started meditating, as I do every morning, and God explained it all to me.
>
> There are several agendas here, Your Honor. .
>
> The prosecutor has an agenda. The Prosecutor's agenda is to convince the Court that I don't believe that God

talks to me and that I am competent to stand trial. On the competency part, I agree with the Prosecutor. I am competent. I have passed two Air Force Sanity Boards to prove that I am competent.

My attorney has an agenda. Because I disagree with him on several issues, he beleives that I'm incompetent. But he also believes that I believe that I talk to God and that God talks to me.

Your Honor, You have an agenda. And your agenda remains the same throughout the entire proceeding, and that is for justice.

And then the most important agenda, the Lord's agenda. His agenda, and I am representing him on this, is that people understand that God does work in the lives of men and women today as much as he ever has in the past. That is the reason that we are here, regardless of what anyone else thinks is the reason.

Captain Tressler has been assigned as my Attorney so that she could handle the sentencing part. I know that God has told me that there is not going to be any sentence, that he is going to deliver me. Therefore, Captain Tressler is no longer necessary.

* * *

One of the things that kept flying back and forth yesterday was whether or not there was a waiver. I know that there is a waiver; my attorney knows that there is a waiver; I am quite sure that the Prosecutor knows that there is a waiver; and everyone in the court knows that this waiver exists; that I have signed this waiver.

* * *

But the real reason I signed the waiver is because anything that I have already told Captain Tressler, I am willing to tell this Court. So, therefore, there is no need

to hide the fact that there is this waiver. If my Attorney later feels that it is necessary for Captain Tressler to testify, when he feels that it is necessary for her to testify then she is still free to testify because the waiver exists. Therefore, all the time that we spent yesterday discussing whether or not Captain Tressler should testify first or last or somewhere in between, we did not have to have that time. She can be dismissed, and testify and be out of the courtroom and not be influenced by the other witnesses. Therefore, I am dismissing her on those grounds.

Appellant next told the military judge what he thought about the defense request to close the hearing on mental capacity:

The Prosecutor has an agenda pertaining to this. His agenda is that the public has a right to know. And I agree with that. The public has a right to know. For a different reason, though. The Court would have to uphold his wishes that the public has a right to know becaus eof the First Amendment. Now, with this right to know, though, and this is the reason prosecutors like to have information released, regardless of how many restraining orders you give the panel members, they read information. They hear information on the television, and they discuss it. That is not going to be stopped. But that's not my reason for agreeing with the Prosecutor. That's my Attorney's reason for not wanting to have an open hearing. My reason is the Lord's agenda. God has told me specifically that he is going to deliver me from this. He has given me a ministry that is going to be a national ministry. Nothing could be better than to have people understand beforehand that this is going to take place. Therefore, I agree with the Prosecutor that all of the information that happens during this hearing be released to the press and be

> available to anyone who wants it. So that when I am delivered people will know that it is going to take place prior to.
>
> Also, Your Honor, so that fairness in this event takes place, any information that the Prosecutor or the Court would release, I would also request that I be allowed to talk to reporters about the Lord's agenda in this case; and I would insist on doing so.

After appellant concluded his narrative, the military judge questioned him further regarding the relief of Captain Tressler. The military judge asked if appellant believed he did not need Captain Tressler because he believed there would be no sentencing, and appellant responded, "I know that we will not need her services."

When the military judge explained the increased burden on the remaining defense counsel, appellant responded that Colonel Brown was "the second attorney on my case." Appellant explained: "Jesus is my first attorney. He tells me what to do. Colonel Brown is my second attorney in this case; and, therefore, he is all that is required."

On the issue of mental capacity, appellant testified that he became a minister in the Greater Mountain Eagle Missionary Baptist Church in Dayton, Ohio, a fundamentalist church believing in a literal interpretation of the Bible, when he was 17 years old. Appellant testified that God speaks to him frequently, but that God has given him permission to talk about it only with certain people. Appellant testified that after he was placed in pretrial confinement, his faith grew substantially because of a series of miracles. These miracles began when appelant's clothing, except for his underwear, was taken from him because he was a suicide risk. Appellant testified that he asked God to return his clothes, and they were returned.

When there was no hot water in the showers, God told appellant to wash his hair every morning. Appellant complied and had hot water when no one else did. Lastly, God confirmed his presence by allowing appellant to see stars at night despite the bright lights of the compound. These miracles convinced appellant that God wanted him to plead not guilty to show people that he would be freed from sentencing by the power of his faith, and that after receiving God's deliverance, appellant would establish a corporation, Faith Unlimited, to preach the message of faith.

The military judge questioned appellant about the timing of his deliverance, resulting in the following colloquy:

> Q. Sergeant Proctor, what is your understanding of what God's will is supposed to be insofar as how this case will end and your delivery?
>
> A. Your Honor, I have tried in the past and God has scolded me because of trying to determine when He is going to do what He has said He is going to do. I know that at the end of everything, one way or another, God is going to deliver me. That is all I know. The when or the how, I don't know.
>
> Q. You say at the end of everything. Does that mean to you at the immediate end or at some time into the future?
>
> A. I believe that it is going to be very shortly.
>
> Q. Could he require patience on your part?
>
> A. That is the first thing He taught me, to be patient. I believe also that even after your part, my part, our part here is concluded, that there is probably going to be some type of treatment to insure also that I will not be involved in that same type of sin again. And that might require patience.

After appellant insisted on calling witnesses to his faith, contrary to the advice of his defense counsel, appellant explained:

> Your Honor, the issue of capacity is based on whether or not I really talk to God and God talks to me or whether he doesn't. That is what the issue is about. And if I am not the only person who knows that God talks to them, I think it is very important that the Court understands this. And that is what these witnesses are about.
>
> My attorney's previous position was that I was not following his advice, therefore, I was not competent. Of course, my position has been I was not following his advice because God is telling me what I should do. Now if I am not the only person who God tells what to do and they do it, then evidently I am competent. And, therefore, God's promise to me to deliver me is going to be on its merits not based strictly on my opinion of what I think God has said.

Following testimony by Major Geeze and before the military judge ruled on the question of appellant's mental capacity, appellant asked to be excused from further attendance at the trial. Appellant read a long passage from the Bible and accused the military judge of not taking the issue seriously. The military judge then denied appellant's request to be excused from further attendance at the trial.

The military judge then denied the defense motion to dismiss the charges or continue the case indefinitely based on lack of mental capacity. He made the following findings of fact and conclusions of law:

> The Court bases this decision on the testimony and exhibits presented at trial as well as the observations of the accused during approximately four days of trial, except for his selection of counsel during the initial 39(a)

Session which pursuant to the Defense request the Court agreed not to consider. The Court has reached its own decision independent of the opinions of the expert witnesses appearing at trial.

* * *

The Court finds that a Delusional Psychosis has not been established by a preponderance of the evidence.

A Personality Disorder has been established, predominantly Narcissistic in nature. The Court does not believe this constitutes, as described in detail during the proceedings, a mental disease or defect. However, because the Court believes that Personality Disorders may qualify technically as mental diseases or defects, the case law being unclear on this issue due to the changes in mental responsibility standards over the past several years, the Court will nonetheless consider it to be a mental defect or disease.

* * *

The real issue before the Court is whether the accused is able to conduct or cooperate intelligently in the defense of the case. The Court finds that he has the capacity to do so.

The Court finds that the accused can assist in accounts of the facts, identities of witnesses, and similar matters. That he has coherency of ideas and control of his mental faculties, as well as the requisite power of memory to allow him to testify in how own behalf, if he desires. The accused has at least average intelligence and is able to express himself quite well.

The Defense urges that the accused suffers from a Delusional Disorer which makes it impossible for him to meet this third prong of the mental capacity test. This is based on the accused's statements that God speaks to

him, that God directs his life, and essentially that God is going to deliver the accused from . . . . The accused believes that God has forgiven him for his sins and that God will deliver the accused as a sign so that the accused can start "Faith Unlimited" to begin teaching about faith in God.

There have been many interpretations of when God would deliver the accused: whether it would be before sentencing, after sentencing, before jail, or after some incarceration. The accused has acknowledged at times that he may have to spend some time in jail, that God has not yet filled in the block regarding his deliverance and that he may need to have some patience.

The accused has acknowledged that he has free will or freedom of choice regarding his decisions, but that he will follow what God directs in order not to sin. The Court finds that the accused understands the decisions are his own to make. Indeed, the accused has indicated that in the past he has violated God's will. As well, the accused has indicated that at times he must seek God's guidance to make sure that what he thought was coming from God was indeed coming from God.

Dr. Piciucco believes the accused has a Delusional Disorder, Psychotic, without any regard to the accused's sociocultural group or his religious background. Dr. Geeze and Dr. Ram believe the accused is not suffering from a Delusional Disorder.

After considering all the evidence, not just the expert witnesses, the Court concludes the Defense has not established by a preponderance of the evidence that the accused is suffering from a Psychotic Delusional Order or a lesser Delusional Disorder rendering the accused unable to conduct or cooperate intelligently in the defense of the case.

After several intervening rulings by the military judge on defense motions, appellant requested to excuse his counsel and defend himself *pro se*. After a lengthy inquiry, the military judge granted his request.

The court-martial recessed overnight after all pretrial motions were litigated. When the court-martial was called to order on the morning of April 4, appellant was absent. He refused to return voluntarily and was carried into the courtroom. He refused to respond to questions from the military judge, attempted to leave the courtroom, and was physically restrained from doing so.

After a one-hour recess appellant was returned to the courtroom wearing hand and leg restraints. The military judge directed that the leg restraints be removed and then asked appellant if he was ready to proceed with the trial. Appellant responded, "Your Honor, I request that you go ahead and give me the maximum so that we can end this." The military judge explained that it was not possible to proceed immediately to sentencing. Appellant then requested that Colonel Brown, the detailed defense counsel, resume his representation. Appellant persisted in his request to be excused from attendance, and the military judge arranged to have appellant sit in an adjoining room and participate in the trial by using closed circuit television.

After findings were announced, appellant returned to the courtroom to make a sworn statement during the sentencing proceedings. He testified in part as follows:

> The first and most important thing that I'm going to say here is that I'm a Christian and that's important because of the things that I've been found guilty of and the things that it's known that I've done, then anyone could do these type of things. And it is a sickness.

> A few minutes ago before I came up here, the Judge for I don't know how many times now, has briefed me on my rights. On 9 November 1988, I called my commander who was not only my commander, but my friend, that evening and I asked him to come to my house and place me under arrest. And at that time I said to him, quote, "Sir, I'm a sexual child abuser." unquote. And at that time and every day almost since then everyone has been telling me about my rights. I don't have any rights.
>
> * * *
>
> I don't have any rights because I hurt those kids. I lost my rights when I did that. Not only did I hurt the kids, I hurt their parents, because a lot of the parents had a lot of trust in me. And out of all the kids that testified there was only one child who I did not know the parent. And not only the parents, but this whole community.
>
> * * *
>
> I wanted to take an oath, ma'am, because you said at this point you'd be very suspicious of any statements that are given. So if I took the oath I'd answer any questions. I don't need Article 31, because I don't have any rights. I've lost my rights. These kids have all the rights.
>
> I apologize to them, to their parents, to the community, and to the Air Force.

On cross-examination, appellant was asked whether he thought he would abuse children again if he were "let out of jail." Appellant responded:

> I don't want to be let out of jail right now. If I'm not going to get help, I don't ever want to get out of jail. And you don't have to believe me, but it's the truth. I told Doctor Geeze that when he did my first sanity board.

Before the Court of Military Review, appellant again raised the issue of mental capacity. Because the Court of Military Review was concerned with "appellant's capacity to assist with his appellate review," that Court ordered a third sanity board in May 1990. That sanity "board concluded that appellant had no severe mental disease or defect and had sufficient mental capacity to understand the nature of both the trial and appellate proceedings." The board's diagnosis was: "pedophile, fixated type, factitious disorder with psychological symptoms." The board diagnosed appellant as "suffer[ing] from a signficant personality disorder" which they believed "could account for his unusual belief that he is on a mission from God." *See* 34 MJ at 552-53 n. 1.

II. Discussion

Appellate defense counsel now argue that appellant's delusion that he would not be sentenced made him mentally incapable of participating intelligently in his defense. The Government argues that appellant's religious beliefs are not a delusional disorder and that the military judge did not abuse his discretion in finding appellant competent. *See generally Short v. Chambers*, 33 MJ 49, 52 (CMA 1991) ("military judge had both power and responsibility to determine whether accused was competent to stand trial").

RCM 909, Manual for Courts-Martial, United States, 1984, provides as follows:

> (a) *In general.* No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against that person or to conduct or cooperate intelligently in the defense of the case.

* * *

(b) *Presumption of capacity.* A person is presumed to have the capacity to stand trial unless the contrary is established.

(c) *Determination at trial.*

(1) *Nature of issue.* The mental capacity of the accused is an interlocutory question of fact.

* * *

(2) *Standard.* Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense of the case.

RCM 909 speaks in terms of a mental disease or defect; however, we noted in *United States v. Benedict*, 27 MJ 253, 259 (CMA 1988), that an accused need not be found to be suffering from a psychosis in order to assert an affirmative defense based on lack of mental responsibility, even though RCM 916(k) (Change 3) requires a finding of "a severe mental disease or defect." Although this case involves mental capacity rather than mental responsibility, the military judge gave appellant the benefit of the same expansive definition of "mental disease or defect" in this case.

The phrase in RCM 909(c)(2)—"understand the nature of the proceedings . . . or to conduct or cooperate intelligently in the defense of the case"—means that the accused "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 789 (1960). This Court has said that the accused

must be able to comprehend rightly his own status and condition in reference to such proceedings; that he must have such coherency of ideas, such control of his mental faculties, and such power of memory as will enable him to identify witnesses, testify in his own behalf, if he so desires, and otherwise properly and intelligently aid his counsel in making a rational defense . . . .

United States v. Williams, 5 USCMA 197, 204, 17 CMR 197, 204 (1954).

Because mental competence to stand trial is a question of fact, RCM 909(c)(1), we will overturn the military judge's determination on appeal only if it is clearly erroneous. *See also United States v. Hayes*, 589 F.2d 811, 822 (5th Cir.), *cert. denied*, 444, 146 (3d Cir. 1987); *United States v. Lovelace*, 683 F.2d 248 (7th Cir. 1982); *Chavez v. United States*, 656 F.2d 512 (9th Cir. 1981); *United States v. Caldwell*, 543 F.2d 1333, 1349 (D.C.Cir. 1974), *cert. denied*, 423 U.S. 1087 (1976).

III. Conclusion

We conclude that the military judge's ruling regarding appellant's mental capacity is amply supported by the record. The military judge's personal evaluation of appellant was based on their numerous and lengthy discussions and supported by expert testimony. Appellant demonstrated throughout the trial that he understood the nature of the proceedings. Notwithstanding his professed belief that God would deliver him from being sentenced, he recognized that his deliverance might not occur when he expected it. On one occasion appellant specifically asked the military judge to sentence him. Appellant participated meaningfully in the sentencing hearing, and he told the military judge he did not want to be released from confinement until he received treatment. After reviewing

the entire record using the "clearly erroneous" standard, we hold that the military judge did not err.

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX, CRAWFORD, and WISS concur.

APPENDIX L

Relevant portions of the Uniform Code of Military Justice (UCMJ)

UCMJ Art. 6, 10 U.S.C. § 806 Judge Advocates and legal officers

(a) The assignment for duty of judge advocates of the Army, Navy, Air Force, and Coast Guard shall be made upon the recommendation of the Judge Advocate General of the armed force of which they are members. The assignment for duty of judge advocates of the Marine Corps shall be made by direction of the Commandant of the Marine Corps. The Judge Advocate General or senior members of his staff shall make frequent inspection in the field in supervision of the administration of military justice.

(b) Convening authorities shall at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice; and the staff judge advocate or legal officer of any command is entitled to communicate directly with the staff judge advocate or legal officer of a superior or subordinate command, or with the Judge Advocate General.

UCMJ Art. 16, 10 U.S.C. § 816 Courts-martial classified

The three kinds of courts-martial in each of the armed forces are—

(1) general courts-martial, consisting of—

(A) a military judge and not less than five members; or

(B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense

counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves;

(2) special courts-martial, consisting of—

(A) not less than three members; or

(B) a military judge and not less than three members; or

(C) only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1)(B) so requests; and

(3) summary courts-martial, consisting of one commissioned officer.

UCMJ Art. 26, 10 U.S.C. § 826 Military judge of a general or special court-martial

(a) A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.

(e) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.

UCMJ Art. 37, 10 U.S.C. § 837 Unlawfully influencing action of court

(a) No authority convening a general, special, or summary court-martial, nor any other commanding of-

ficer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions solely for the purpose of instructions given in open court by the military judge, president of a special court-martial, or counsel.

(b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

UCMJ Art. 66, 10 U.S.C. 866

(a) Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or the highest court of a state. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Military Review established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(c) In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law *and fact* and determines, on the basis of the entire record, should be approved. In considering the record, it may *weigh the evidence, judge the credibility of witnesses*, and *determine controverted questions of fact*, recognizing that the trial court saw and heard the witnesses.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Military Review and shall meet periodically to formulate policies and

procedure in regard to review of court-martial cases in the office of the Judge Advocates General and by Courts of Military Review.

(g) No member of a Court of Military Review shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Military Review, an effectiveness, fitness, or efficiency report, or any other report documents used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces shall be retained on active duty.

APPENDIX M

Rule for Courts-Martial 1002, Manual for Courts-Martial, 1984

Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized in this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment.

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No. 93-447

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROBERTO TORO, JR., PETITIONER

v.

UNITED STATES OF AMERICA
(AND OTHER CASES)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, prohibits Congress from authorizing the Judge Advocates General to select commissioned officers in the military to serve as court-martial trial judges and judges of the courts of military review.

2. Whether due process requires that court-martial trial judges and judges of the courts of military review have fixed terms of office.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the Court of Military Appeals, Pet. App. 89a-103a, and the Air Force Court of Military Review, Pet. App. 104a-133a, in *United States* v. *Toro* are reported at 37 M.J. 313 and 34 M.J. 506, respectively. The opinion of the Court of Military Appeals, Pet. App. 134a, in *United States* v. *Lipscomb* is not yet officially reported; the opinion of the Air Force Court of Military Review in that case is unreported. The opinion of the Court of Military Appeals in *United States* v. *Coppock*, Pet. App. 135a-149a, is reported at 37 M.J. 145; the opinion of the Air Force Court of Military Review in that case is unreported. The opinion of the Court of Military Appeals in *United States* v. *Harvey*, Pet. App. 150a-158a, is

reported at 37 M.J. 140; the opinion of the Air Force Court of Military Review in that case is reported at 33 M.J. 822. The opinion of the Court of Military Appeals in *United States* v. *Teters*, Pet. App. 159a-177a, is reported at 37 M.J. 370; the opinion of the Air Force Court of Military Review in that case is unreported. The opinion of the Court of Military Appeals in *United States* v. *Perry*, Pet. App. 178a-182a, is reported at 37 M.J. 363; the opinion of the Air Force Court of Military Review in that case is unreported. The opinion of the Court of Military Appeals in *United States* v. *Proctor*, Pet. App. 183a-198a, is reported at 37 M.J. 330; the opinion of the Air Force Court of Military Review in that case is reported at 34 M.J. 549.

JURISDICTION

The judgment of the Court of Military Appeals was entered in *United States* v. *Toro* on August 3, 1993, in *United States* v. *Lipscomb* on August 20, 1993, in *United States* v. *Coppock* and *United States* v. *Harvey* on June 25, 1993, in *United States* v. *Teters* on August 12, 1993, and in *United States* v. *Perry* and *United States* v. *Proctor* on August 18, 1993. The petition for a writ of certiorari in these cases was filed on September 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. III 1991).

STATEMENT

Petitioner Toro was convicted of three specifications of using methamphetamines, one specification of introducing methamphetamines onto a military facility, and two specifications of distributing methamphetamines, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 912a. He was sentenced to confinement for seven years, a dishonorable discharge, total forfeitures of pay and allowances, and a reduction in rank to the lowest enlisted grade. Pet. App. 129a.

Petitioner Lipscomb was convicted of premeditated murder and obstruction of justice, in violation of Articles 118 and 134 of the UCMJ, 10 U.S.C. 918 and 934. He was sentenced to confinement for life, a dishonorable discharge, total forfeitures of pay and allowances, and a reduction in rank to the lowest enlisted grade. The confinement was reduced by the convening authority to 60 years' imprisonment pursuant to a pretrial agreement.

Petitioner Coppock was convicted of two separate desertions, escaping from confinement, unlawful carnal knowledge, two automobile larcenies, assault on a civilian police officer, and kidnapping a four-year-old child, in violation of Articles 85, 95, 120, 121, 128, and 134 of the UCMJ, 10 U.S.C. 885, 895, 920, 921, 928, and 934. He was sentenced to confinement for 25 years, a dishonorable discharge, total forfeitures of pay and allowances, and reduction to the lowest enlisted grade. Pet. App. 135a-136a.

Petitioner Harvey was convicted of using and distributing cocaine and endeavoring to impede an investigation, in violation of Articles 112a and 134 of the UCMJ, 10 U.S.C. 912a and 934. She was sentenced to confinement for 15 months, a dishonorable discharge, total forfeitures of pay and allowances, and a reduction in rank to the lowest enlisted grade.

Petitioner Teters was convicted of four specifications of larceny and two specifications of forgery, in violation of Articles 121 and 123 of the UCMJ, 10 U.S.C. 921 and 923. She was sentenced to confinement for three months, a bad conduct discharge, forfeitures of $400 pay per month for three months, and a reduction in rank to the lowest enlisted grade. Pet. App. 150a-151a.

Petitioner Perry was convicted of use of cocaine, in violation of Article 112a of the UCMJ, 10 U.S.C. 912a. He was sentenced to confinement for one year, a bad conduct

discharge, and forfeitures of $200 pay per month for 12 months. Pet. App. 178a-179a & n.1.

Petitioner Proctor was convicted of multiple specifications of indecent acts and assaults on children under 16 years of age, in violation of Articles 134 and 128 of the UCMJ, 10 U.S.C. 934 and 928. He was sentenced to confinement for 30 years, a dishonorable discharge, total forfeitures of pay and allowances, and a reduction in rank to the lowest enlisted grade. Pet. App. 183a-184a.

In each case, the court of military review upheld the findings and sentence, and the Court of Military Appeals thereafter affirmed the judgment of the court of military review.

ARGUMENT

Petitioners present two claims. First, they argue that the military trial and appellate judges in their cases were not qualified to hold those positions because they were appointed to them by the Judge Advocate General of each respective service in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. Second, petitioners claim that their trials and their appeals to the courts of military review were fundamentally unfair because the military judges sitting on those courts do not enjoy a fixed term of office and can be reassigned to other military duties by the Judge Advocate General based on his evaluation of their performance as judges.

The questions presented in this petition are not materially different from the questions presented in *Weiss* v. *United States*, cert. granted, No. 92-1482 (May 24, 1993), which the Court has already decided to review. Accordingly, we believe that this petition should be held until this Court has decided *Weiss* and should then be disposed

of as appropriate in light of the Court's decision in that case.*

---

* In the cases of petitioners Lipscomb and Toro, the Court of Military Appeals granted review on both the Appointments Clause and due process issues that are presented in the petition. By contrast, petitioners Coppock, Harvey, Teters, Perry, and Proctor did not raise either claim at any stage of their cases with regard to either their trial judges or the judges of the court of military review. See Pet. 3. What is more, no military court addressed those questions in their cases. Accordingly, it is not clear that those questions are subject to review by certiorari in this Court in those cases.

The statutes providing for certiorari review of the judgments of the Court of Military Appeals, 10 U.S.C. 867a(a) (Supp. IV 1992) and 28 U.S.C. 1259(3) (Supp. III 1991), restrict this Court's certiorari jurisdiction to "[d]ecisions" of the Court of Military Appeals. Article 67a(a) of the UCMJ, 10 U.S.C. 867a(a) (Supp. IV 1992), further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory authority to limit decisions in any case to less than all the issues urged by the defendant. Art. 67(c), UCMJ, 10 U.S.C. 867(c) (Supp. IV 1992). Since petitioners Coppock, Harvey, Teters, Perry, and Proctor did not raise those issues for review by the Court of Military Appeals and since that court did not pass on those issues, there is a question whether that court rendered a "[d]ecision" on the issues presented in the petition in the cases of petitioners Coppock, Harvey, Teters, Perry, and Proctor.

It is unnecessary to answer that question in this case, however, because the Court of Military Appeals has indicated that it will accept out-of-time requests for relief from servicemembers if this Court grants relief to servicemembers in any of the other cases presently pending before the Court raising the same issues. *United States* v. *Rice*, 36 M.J. 264 (1993). Thus, if this Court grants relief to the petitioners in *Weiss*, it may be appropriate to allow the Court of Military Appeals to decide whether to grant relief to parties such as these petitioners, since that course may render moot the question whether this Court can grant relief to such parties.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Weiss* v. *United States*, cert. granted, No. 92-1482 (May 24, 1993), and then should be disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted.

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